TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 109

TANK TRUCK RENTALS, INC., PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 22, 1957
CERTIORARI GRANTED JUNE 17, 1957

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PETITIONER'S APPENDIX.

RELEVANT DOCKET ENTRIES.

Oct. 19, 1953.	Petition received and filed. Taxpayer notified. Fee paid.
Oct. 19, 1953.	Copy of petition served on General Counsel.
Oct. 19, 1953.	Request for circuit hearing in Phila., Pa. filed by taxpayer. 10 22 53 Granted.
Dec. 2, 1953.	Answer filed by General Counsel.
Dec. 9, 1953.	Copy of answer served on taxpayer, Phila., Pa.
Dec. 30, 1954.	Hearing set March 14, 1955, Philadelphia, Pa.
Mar. 28, 1955.	Hearing had before Judge Raum on petitioner's oral motion to continue.
Mar. 28, 1955.	Order, motion granted, case continued generally on the Philadelphia calendar, entered.
Aug. 26, 1955.	Hearing set November 28, 1955, Phila., Penn.
Nov. 29 & 30, 1955.	Hearing had before Judge Raum on the merits, Stipulation of Facts and Supplemental Stipulation of Facts, filed at hearing. Briefs due 1/16/56. Respondent's Brief due 2/15/56, Petitioner's Reply Brief 3/6/56.
Dec. 9, 1955.	Transcript of Hearing 11/29/55 filed.
Dec. 9, 1955.	Transcript of Hearing 11/30/55 filed.

Jan. 10, 1956.	Motion for extension to Feb. 6, 1956 to file brief filed by taxpayer. 1-10-56 Granted.
Feb. 2, 1956.	Brief filed by taxpayer. 2-2-56 copy served.
Mar. 7, 1956.	Respondent's Brief in answer, filed. 3-8-56 Copy served.
May 31, 1956.	Findings of Fact and Opinion filed. Judge Raum. Decision will be entered for the Respondent. Served 6-4-56.
June 12, 1956.	Decision entered. Judge Raum. Div. 11. Served 6-13-56.
Aug. 29, 1956.	Petition for Review by U. S. Court of Appeals for the Third Circuit, filed by petitioner.
Aug. 30, 1956.	Proof of Service filed.

EXCERPTS FROM PETITION.

* * *

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in disallowing as a deduction from gross income and or gross receipts the sum of $41,060.84 or any part thereof, allegedly representing non-deductible fines paid to the State of Pennsylvania for overloading of trucks using the Pennsylvania highways, and in failing to determine that said sum of $41,060.84 was deductible from gross income and or gross receipts as ordinary and necessary expenses incurred and paid by petitioner during the taxable year in carrying on its trade or business.

(b) In the alternative, the Commissioner erred in failing to determine that the sum of $41,060.84 disallowed as a road expense deduction was deductible from gross income and or gross receipts either as:

(1) reasonable compensation incurred and paid by petitioner during the taxable year for personal services actually rendered to petitioner;

* * *

STIPULATION OF FACTS.

It is hereby stipulated with respect to the above-entitled proceeding that the following statements may be accepted as facts and that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence at the trial of this case not inconsistent with the facts herein stipulated:

1. The petitioner is a corporation duly organized on January 1, 1945 and existing under the laws of the State of Pennsylvania.

2. The petitioner kept its books and filed its income tax return for the taxable year 1951 on a calendar year basis, and on the accrual method of accounting.

3. The petitioner was during the taxable year 1951 engaged in the business of transporting bulk liquids by motor vehicles under lease or rental agreements with motor carriers holding an operating certificate issued by the Interstate Commerce Commission and/or Public Utility Commissions of the various states hereinafter mentioned in and through which petitioner transported said bulk liquids. Petitioner leased to said certificated carriers the motor vehicles hereinafter described and furnished the driver-operator of same as petitioner's employee.

4. Said lease and rental agreements with the various certificated carriers were in the form substantially the same as the agreement entitled "Coastal Tank Lines, Inc.—Equipment Lease" annexed hereto as Exhibit 1.

5. The motor vehicles used and operated by petitioner in the course of its business during the taxable year and leased as aforesaid consisted solely of truck tractor and semi-trailer combinations. During said taxable year, petitioner owned and operated the following numbers and kinds of truck tractors and semi-trailers:

142 truck tractors, each of which had two axles.

112 semi-trailers, of which 62 had a single axle and 50 had two axles.

The capacity of the tank on the single axle semi trailers ranged from 4,500 to 5,000 gallons. The capacity of the tank on the two or tandem axle semi trailers ranged from 4,600 to 5,900 gallons.

6. During the taxable year, petitioner operated its motor vehicles as aforesaid in the following states for the following approximate distances and made the following approximate number of trips:

State	No. of Miles	No. of Trips
Pennsylvania	6,110,798	77,385
Ohio	971,643	5,293
New Jersey	856,973	14,146
Delaware	383,612	2,984
Maryland	314,960	10,712
West Virginia	238,750	3,937
Totals	8,956,738	114,457

7. Prior to and during said taxable year, each of the aforementioned states prescribed by statute the maximum weight for motor vehicles using the public highways of the respective states. During said taxable year, the statutory maximum gross weight for the truck tractor and semi-trailer combination owned, used and operated by petitioner was, for each of the aforesaid states, as follows:

State	Statutory Citation	Maximum Gross Weight
Pennsylvania	75 P.S. § 453(g)	45,000 lbs.
New Jersey	N.J.S.A. § 39.3-84	60,000 lbs.
Ohio	Page's Ohio Gen. Code Anno. § 7246	Statutory formula which results in range from 57,000 to 67,600 lbs.

State	Statutory Citation	Maximum Gross Weight
Delaware	Del. Code Anno. Title 21, Chapter 45, § 4503	48,000 lbs. for single axle trailers; 60,000 lbs. for tandem axle trailers.
West Virginia	1951 Supp. to West Va. Code of 1949 Anno. § 1721 (463)	Statutory formula which results in range from 54,000 to 60,800 lbs.
Maryland	Flach, 1951 Anno. Code of Maryland § 278	Statutory formula which results in gross weight of 65,000 lbs.

8. During the taxable year, petitioner incurred and paid sums characterized by the laws of the aforesaid states as fines in the total amount of $37,965.00 for operating on the highways motor vehicles in violation of state statutes prescribing weights of motor vehicles. Of this $37,965.00, the sum of $35,165.00 constituted fines imposed for exceeding the maximum weights prescribed by the statute of the state in which the fine was imposed. The balance, or $2,800.00, of the sum of $37,965.00, constituted fines imposed on petitioner by New Jersey. Of this amount, not less than $400.00 constituted fines imposed on petitioner by New Jersey for operating in New Jersey a vehicle which exceeded the maximum gross weight imposed by the Pennsylvania statute but did not exceed the maximum gross weight imposed by the New Jersey statute. Such New Jersey fines were imposed in accordance with N. J. S. A. § 39:3-84.3.

9. The following table shows, with respect to the taxable year involved, the number and dollar amounts of fines and costs paid by petitioner to each of the states involved:

	Number of Fines	Dollar Amt. of Fines	Dollar Amt. of Costs	Total
Pennsylvania				
at $50. each	649	$32,450.00	$2,709.40	$35,159.40
at $25. each	62	1,550.00	226.75	1,776.75
New Jersey	7	2,800.00	30.00	2,830.00
Maryland	7	410.00	29.91	439.91
Ohio	9	405.00	51.10	456.10
West Virginia	10	320.00	39.68	359.68
Delaware	2	30.00	9.00	39.00
	746	$37,965.00	$3,095.84	$41,060.84

10. Petitioner's vehicles made approximately 77,385 trips during the taxable year in and through Pennsylvania. On a substantial number of these trips, petitioner knowingly operated without a permit vehicles which exceeded the maximum gross weight prescribed by the Pennsylvania statute, but on many of such occasions petitioner's vehicles were not stopped by the Police and consequently petitioner was not fined. On many of the 711 occasions on which petitioner was fined in Pennsylvania, as aforesaid, petitioner knowingly operated without a permit vehicles which exceeded the maximum gross weight prescribed by the Pennsylvania statute.

11. As of January 1, 1945, the maximum gross weight for truck tractor and semi-trailer combinations owned, used and operated by petitioner prescribed by the laws of Pennsylvania for motor vehicles using the highways of said state was 45,000 pounds.

12. During the entire taxable year 1951 there were in full force and effect between petitioner and its employee-drivers of its motor vehicles, represented by the Drivers and Employees of the Petroleum Industry, Local Union 273, A. F. L., and International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers, Drivers' Local Union No. 110, A. F. L., and Joint Council of Teamsters Local Union No. 40 of Pittsburgh, A. F. L., agreements substantially identical to Guaranteed Agreement dated August 16, 1950, a copy of which is annexed hereto as Exhibit 2, relating, inter alia, in Article 8(b), to the operation of overloaded equipment, and prior to the taxable year agreements were in effect between petitioner and its employee-drivers of its motor vehicles with substantially the same provisions as that set forth in said Article 8(b).

13. During the taxable year petitioner paid the sum of $36,936.15, as set forth in Paragraph 9 hereof, on the basis of notices of and informations pertaining to violations of the Motor Vehicle Code of Pennsylvania in the form set forth in Exhibits 3 and 4 annexed hereto.

14. Annexed hereto as Exhibit A is a photostatic copy of petitioner's income tax return for the year 1951. The amount of $41,060.84 referred to above was included in "Transportation Expense . . . $593,066.08" in Schedule B—Cost of Operations.

LEONARD SARNER,
Leonard Sarner,
Counsel for Petitioner.

(Signed) JOHN POTTS BARNES,
EMW
John Potts Barnes,
Chief Counsel, Internal Revenue Service,
Counsel for Respondent.

SUPPLEMENTAL STIPULATION OF FACTS.

It is hereby stipulated with respect to the above entitled proceeding that if the matters set forth in this Supplemental Stipulation of Facts are admissible in evidence over the objection of Respondent as to relevancy and materiality, they may be accepted as facts.

1. The following table shows, with respect to the taxable year 1951, the number and dollar amount of fines imposed and paid in Pennsylvania as a result of the enforcement by the Pennsylvania State Police of the Pennsylvania statute prescribing maximum gross weight for motor vehicles:

No. of Vehicles Stopped and Weighed	182,082
No. of Fines for vehicles over 5% and less than 10% overweight	7,875
Dollar amount of fines for vehicles over 5% and less than 10% overweight	$196,875.00
No. of fines for vehicles over 10% overweight	20,540
Dollar amount of fines for vehicles over 10% overweight	$1,027,000.00
Total No. of fines	28,415
Total dollar amount of fines	$1,223,875.00

The above table does not show, with respect to the taxable year 1951, the number and dollar amount of fines imposed and paid in Pennsylvania as a result of the enforcement of the Pennsylvania statute prescribing maximum gross weight for motor vehicles by the police of the local Pennsylvania municipalities and political sub-divisions, nor does it show the number of motor truck concerns whose vehicles were stopped, weighed and/or fined, such information being incapable of proof by the reasonable expenditure of time and effort by the parties hereto.

2. Account No. 4280 of the Uniform System of Accounts for Class I Common and Contract Motor Carriers of Property prescribed by the Interstate Commerce Commission for the year 1951 was as follows:

"182.4280 *Other transportation expenses.* This account shall include transportation department expenses that are not provided for elsewhere.

ITEMS

Badges for employees.
Expenses other than wages of deadheading drivers.
Extra labor hired for loading and unloading the carrier's vehicles except at its terminals.
Fines for traffic violations.
Ice and other refrigerants.
Lodging for drivers and miscellaneous transportation employees.
Meals for drivers and miscellaneous transportation employees.
Payments to customers' employees for services after hours.
Pilot cars and drivers, cost of providing.
Plates, vehicle identification (State and others, not renewable periodically).
Repairs to transportation structures, fixtures and equipment.
Tolls—bridge, tunnel, highway and ferry.
Uniforms for drivers.
Wages, materials and tools, used in, and amounts paid others for, clearing and sanding roads.
Weighing freight, other than at carrier's terminals."

3. Motor Carrier Annual Report, Form A, required to be filed with the Interstate Commerce Commission by

Class I Motor Carriers of Property for the year 1951 sets forth, inter alia, the following:

"Schedule 4090. Operation and Maintenance Expenses

(Property Carriers)

Line No.	Item (a)	Amt. of Exp. for yr. (b)
	* * *	
(4200)	Transportation:	
	* * *	
(4280)	Other Transportation Expenses	
	* * *	
	Total	

4. The Pennsylvania Public Utility Commission follows, adopts and interprets accounting words and phrases and prescribes that annual reports which may be required to be submitted to it by Class I Motor Carriers be prepared in accordance with the aforesaid Uniform System of Accounts prescribed by the Interstate Commerce Commission.

5. Petitioner did not, during the taxable year 1951, hold any operating certificate issued by the Interstate Commerce Commission and or by the Pennsylvania Public Utility Commission, and, accordingly, was not required to nor did it for said taxable year 1951, file the annual reports referred to in Paragraphs 3 and 4 hereof.

6. During the period May 1, 1945 to December 31, 1951, inclusive, Bills of which copies are annexed hereto as Exhibits 5, 6, and 7, were introduced in the House of Representatives or Senate of the State of Pennsylvania pertaining to the gross weight of motor vehicles using the

highways of Pennsylvania. None of these Bills was enacted into law.

LEONARD SARNER,
Leonard Sarner,
Counsel for Petitioner.
(Signed) JOHN POTTS BARNES,
EMW.
JOHN POTTS BARNES,
Chief Counsel,
Internal Revenue Service,
Counsel for Respondent.

EXCERPT FROM EXHIBIT 2.

ARTICLE 8.

* * *

(b) Whenever employees are required to operate overloaded equipment or are instructed by foreman, dispatcher or some bonafide representative of the Employer to operate in violation of any laws of the various commission such as: Public Utility or Interstate Commerce, etc., and are penalized because of such violations, the Employer shall bear all costs in connection with such violations including accrued overtime and any earnings opportunity the employee might suffer. In the event that any employee may suffer revocation of his driver's license due to a succession of such violations, the Employer shall provide suitable employment for the entire period of such revocation of license at no less than his regular earnings at the time of revocation.

* * *

DATE	CHECK NO.	NAME	AMOUNT	CREDITS	DISCOUNT % AMT	NET
11-30	4008	Fred C. Waly	53 50			53 50

DATE	INVOICE NO.	AMOUNT	DATE	INVOICE NO.	AMOUNT	DATE	INVOICE NO	AMOUNT
11/30	Leroy W. Stonebrook							

TANK TRUCK RENTALS INC LANCASTER PA

TANK TRUCK RENTALS Inc:
Transportation of Liquid Products
MANHEIM PIKE

No L 1008

60-140
313

PAY

LANCASTER, PA., Dec. 1 1951

TO THE ORDER OF

Fred C Walz, J.P.
Box 1, Essington, Pa.

TANK TRUCK RENTALS, INC.

VICE PRES

OFFICE MGR

THE LANCASTER COUNTY NATIONAL BANK
LANCASTER, PENNSYLVANIA

Notice to Appear--Auto Violation

Commonwealth of Pennsylvania)
County of Delaware) ss.

To Percy W. Stanemuch
512 Bethlehem Pike, Amble-Mont. Gr. Penna

Take Notice that an information, of which a copy is enclosed, was filed with me against you on the 22 day of November, 1957

You are hereby notified to appear before me at my office located at Front Street and Saude Avenue, Essington, Pa., within ten days of the date of this notice, failing which a warrant will be issued against you.

If you desire to plead guilty, you may send the fine and costs in the amount of 15.50 / 1.00 ft. 1 hwy 8.00 / 1.00 Dollars and you need not appear.

If you desire a hearing, please notify me at least two days before the proposed date for the same, which must not be later than ten days from the date of this notice.

Witness my hand and seal this 27th day of November, 1957

Fred C Walz J P
(OFFICIAL TITLE)
My Commission expires the first Monday in January, 1954

Check or M. O. To Be Made To FRED C. WALZ. Justice of Peace, Box 1, Essington, Pa.

ANIBA PRINT ESSINGTON, PA.

INFORMATION Automobile A-47a Copy

Commonwealth of Pennsylvania
County of Delaware } ss.

328 2727

THE INFORMATION OF Pfc. James Holland, of Pennsylvania State Police, County of Delaware, and Commonwealth of Pennsylvania.

The said Officer being duly sworn according to law, deposes and says that or about the hour of 9,10 o'clock A.M., on the 20th day of November 1957 one Percy W. Stonerock residing at 512 Bethlehem Pike, Ambler - Mont Co Penna the driver of a certain motor vehicle bearing Pennsylvania Registeration License Tag No. Y 625 R., violated Sub-Section G Section 903, Article 9 of The Vehicle Code of the Commonwealth of Pennsylvania; while driving on the public road at Tinicum Twp., Del County, Pennsylvania on Industrial Highway, did unlawfully carry a gross weight of 52900 lbs., allowed by Law 45000 lbs., or, in excess of 7900 lbs. Charge overweight 10 per centum of that allowed by Law.

Contrary to the Act of Assembly enacted May 1st, 1929, As amended by the Act of Assembly enacted June 22nd, 1931 and further amendments thereto.

Copy

Sworn and subscribed to before me this
20th day of November 1957
My Commission expires the first Monday in January, 1954
Fred C. Walsh
J. P.

Pfc. James Holland

EXCERPTS FROM TESTIMONY.

(15)* The Court: You may present the stipulation.

Mr. Sarner: We present the stipulation of facts which is capable of presented at this time and also a supplemental stipulation of facts.

(16) The Court: You present them one at a time.

Mr. Sarner: I offer the stipulation of facts, with the exhibits attached, into evidence.

Mr. Armstrong: No objection.

The Court: It will be received.

Mr. Sarner: Your Honor, we also have a supplemental stipulation of facts which has an introductory paragraph reciting that, "It is hereby stipulated with respect to the above-entitled proceeding that if the matters set forth in the Supplemental Stipulation of Facts are admissible in evidence over the objection of Respondent as to relevancy and materiality, they may be accepted as facts."

I think I am correct in understanding that the competency and the truthfulness of the facts which are asserted in the supplemental stipulation is not objected to by the Respondent, it is just the materiality or relevancy.

Mr. Armstrong: That is correct. I object to the relevancy and materiality of these items, Paragraphs 1 through 6.

The Court: May I see the supplemental stipulation.

(A document was handed to the court.)

The Court: I have just examined the supplemental stipulation rather hastily. It does appear to me that the material contained therein is a bit remote. Nevertheless, I will accept it for whatever it may be worth.

Mr. Sarner: Thank you, Your Honor.

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* Figures in parentheses refer to page numbers of typewritten transcript.

(17) At this time I call Mr. Kahley.

Whereupon,

VICTOR R. KAHLEY

was called as a witness on behalf of the Petitioner and, having been first duly sworn, testified as follows:

The Clerk: State your name and address, Mr. Witness.

The Witness: Victor R. Kahley; 555 North School Lane, Lancaster, Pennsylvania.

DIRECT EXAMINATION.

By Mr. Sarner:

Q. What is your occupation, Mr. Kahley?

A. I am vice president and general manager of Tank Truck Rentals, Inc.; Petroleum Transport, Inc.; and Northland Petroleum Transport Company.

Q. And the Tank Truck Rentals, Inc., is the Petitioner in this case?

A. That is correct.

Q. In what type of buiness is this company engaged?

A. Engaged in the transportation of liquid commodities.

Q. By what type of equipment?

A. Our equipment consists of truck tractors and semitrailor tanks. We operate this equipment under lease arrangement with our own drivers to certificated carriers who are authorized to conduct their business either by the Interstate Commerce Commission or the state public utility commissions, or both.

(18) Q. When was the company formed, Mr. Kahley?

A. January 1, 1945.

Q. And how long have you been connected with the company?

A. Since its inception.

Q. How long have you been engaged in the business of transporting fuel liquids by motor carrier?

A. Since 1935.

Q. In what capacity were you employed in 1951 by the company?

A. As general manager and vice president.

Q. What was the nature and extent of your duty and responsibility as such officer?

A. I was in complete charge of the operations, tariff, labor relations.

Q. Therefore, am I correct in understanding that you are familiar with the matter and nature and extent of the operation of the business in 1951?

A. Yes, sir.

Q. Now you have already testified that the company well, did the company itself operate under certificates of authority granted to it by the Interstate Commerce Commission or the state public utility commissions?

A. No, they did not.

Q. Now I show you Exhibit 1 and ask you if you are familiar with this exhibit.

(19) A. Yes, I am.

Q. Will you explain what that is?

A. That is a lease agreement for the rental of our equipment with drivers between ourselves and Coastal Tank Lines who were certificated carriers authorized to do business by both the Interstate Commerce Commission and the various state regulatory bodies.

Q. Who were your lessees in 1951, if you know.

A. Coastal Tank Lines; Chemical Tank Lines; Leeman Transportation Company; Petroleum Transport, Inc., and Northland Petroleum Transport Company.

Q. What was the form of your rental or lease arrangements with these other carriers in 1951?

A. Substantially the same as the exhibit.

Q. Now returning to the mechanics of your company's operations, Mr. Kahley, how do you get your orders?

A. We receive our orders daily from the certificated carrier.

Q. What does "over-the-road transportation" mean in your industry?

A. It means the transportation of liquid commodities between towns or cities, not solely within a municipality.

Q. Is that the type of transportation that your company is engaged in?

A. Yes, sir.

(29) Q. Are you familiar with the percentage of the total amount of over-the-road transportation of bulk liquids by motor carriers which the lessees for whom you operated in 1951 controlled in the states in which you operated?

Mr. Armstrong: Just a minute. I object to this question, Your Honor, on the grounds that this witness is not competent to answer that.

The Court: You were asking him whether he know?

Mr. Sarner: Yes, I asked him whether he knew.

The Court: The witness can state whether he knows or not and indicate the source of his knowledge.

By Mr. Sarner:

Q. Can you answer the question?

A. I would answer that that I feel——

Q. Just answer you know or don't know.

A. Yes, I feel I know.

The Court: Well, that is not satisfactory. Do you know or don't you know?

The Witness: No, perhaps I would not have any fact other than statements from the other carriers as to the amount of business they possibly control.

The Court: That would be hearsay?

The Witness: That is right.

By Mr. Sarner:

Q. Now you operate for all of these companies, do you not (21) Mr. Kahley? The companies that we have mentioned, your lessees?

A. Yes, I do. And of course today one in addition to those in 1951.

Q. Do you know the amount of equipment which they own and operate?

A. Approximate figures.

Q. Do you know the state in which they operate?

A. Yes, I do.

Q. From that information can you not say that you do know the percentage for hire transportation business which they performed in 1951?

A. Well, I would say with the lessees that we had used at that time, together with the Matlack Company, they would have controlled 85 per cent.

Mr. Armstrong: I move that that be stricken, Your Honor. This witness has not shown he is competent to answer the question. It is hearsay. He is basing it on a statement that he has heard, on what he has been told by these carriers.

Mr. Sarner: I think that is not so, Your Honor. The witness has stated that he does know the amount of equipment which the other carriers own and operate, that he works for all of these carriers. I think he can state as a member of the industry and also as one of the lessees of all of these carriers the extent of the percentage operations of these carriers and the various phases——

(22) The Court: I do not know what percentage operation means—number of miles, percentage of gross receipts, whether it is the percentage of the number of industries. This is very vague and loose testimony, Mr. Sarner.

I will let the answer stand with all the weaknesses appearing in it, and I will just take it for whatever it is worth.

Mr. Sarner: We will be able to clarify that.

By Mr Sarner:

Q. In what states did your company operate in 1951, Mr. Kahley?

A. New Jersey, Pennsylvania, Maryland, Delaware, West Virginia, and Ohio.

Q. Were you engaged in inter- or intra-state business, or both?

A. Both.

Q. Do you know whether of not your lessees were engaged in inter- or intra-state business, or both?

A. In both.

Q. Do you know with respect to your own operations the percentage of your trips where Pennsylvania was either the originating state, destination state, or through which Pennsylvania was a link in an originating or destination state?

A. Will you ask me that question again?

(The pending question was read by the reporter.)

(23) The Witness: May I ask a question?

The Court: If the question is not clear, you may.

The Witness: It is not clear. I am asking whether it is strictly the interstate business or the intra- and inter-combined.

By Mr. Sarner:

Q. No, inter- and intra- business.

A. Approximately 100 per cent of the business was intra- and inter- combined.

Q. And in which Pennsylvania was either one of the states involved?

A. That is correct.

Q. Now you are familiar, are you not, with the kind and number of pieces of equipment which your company owned and operated in 1951?

A. Yes, sir.

Mr. Sarner: Will you mark this for identification.

(Petitioner's Exhibit No. 8 marked for identification.)

By Mr. Sarner:

Q. I show you this model, Mr. Kahley, which has been marked for identification as Exhibit 8 and ask you if you can explain whether or not this is similar or dissimilar to the type of equipment which your company operated.

A. Yes. This is a truck tractor and a tandem semi-trailor (24) tank. We had this type equipment and also a single axle semi-trailor which differs from this model inasmuch as it has only one axle instead of the two.

Q. Did your company have any equipment other than equipment of this type in 1951?

A. No, that is the only type of equipment.

Q. Was your equipment in 1951, if you know, similar or not similar to the equipment used and operated generally in the industry?

A. The equipment was similar to that used in the petroleum transporting industry. One of the main reasons why it was similar was that during the war years the War Production Board had issued orders to the various truck manufacturers setting up a standardized size of equipment that was to be used over the entire United States. These particular vehicles were tank vehicles and were to be of a minimum of 4500 gallon capacity.

Q. Now how did the capacities of your tanks which we have stipulated ranged between 4500 gallons and 5000 gallons, how did the capacity of your tanks compare with the tanks which were used generally in the industry in the area in which you operated?

A. Basically the same.

Q. Do you know the approximate weight of your truck tractor unloaded?

A. Yes, approximately 12,000 pounds.

Q. If you know, what are the weights of the semi-trailor (25) tanks unloaded?

A. A single axle trailer tank weighs approximately 8,000 pounds, or a tandem axle semi-trailer tank weighs approximately 10,000 pounds.

Q. What are the most common types of bulk liquid which your company carries?

A. Gasoline, kerosene, domestic fuel oil, and Bunker C fuel oils.

Q. Do you know the weights of these various liquid items?

A. Yes, sir.

Q. Will you state them, please.

A. The gasoline, six pounds per gallon; kerosene, six and three-quarter pounds per gallon; domestic fuel oil, seven pounds per gallon; and Bunker C oil approximately eight pounds per gallon.

Q. In 1951 were you familiar with the maximum gross weight limitations for your type of motor vehicle equipment using the highways in the various states in which your company operated?

A. I was.

Q. We have stipulated that the weight of Pennsylvania was 45,000 pounds and of the other states in which you operated approximately 60,000 pounds. Was that your understanding in 1951?

A. That is basically correct.

Q. Now I think you stated previously that the unloaded (26) weight of your truck tractor and semi-trailer tank would range between the 20,000 and 22,000 pounds combined. Under those circumstances how much weight, and limiting yourself in [illegible] for the moment only, could you have carried in the tank?

A. Approximately 25,000 to 27,500 pounds. That is taking advantage of the five per cent leeway which was a tolerance granted by Pennsylvania.

Mr. Sarner: If Your Honor please, I do have a copy of the Vehicle Code of Pennsylvania which I meant to offer. I have one for the Respondent also. The statutory citations, it may be helpful if Your Honor has that in front of him.

The Court: I will receive it; not in evidence.

Mr. Sarner: No, not in evidence; just as a judicial reference.

The Court: I take it the parties agree that the court may take judicial reference, notice of these provisions.

Mr. Armstrong: Yes.

Mr. Sarner: Certainly.

The Court: I will accept this paper that Mr. Sarner just handed up merely as a convenient way of bringing it to my attention.

By Mr. Sarner:

Q. Mr. Kahley, who would determine in 1951 the amount of liquid which was loaded in your tanks?

A. Well, I had issued orders that all our tanks be loaded (27) to marker capacity of the vehicles.

The Court: Loaded to what sort of capacity?

The Witness: Marker capacity.

The Court: What does that mean?

The Witness: In each of these tanks they are calibrated by certificated calibrators measuring the liquid gallons. There is a rod extending down from the top of the truck which has fingers at right angles from that rod so that as this tank is calibrated to the proper capacity this finger is then placed on this rod and your

capacity then is to that particular marker. A tank truck cannot be loaded to the full maxim of the truck. Regulations make it necessary that you have a three per cent expansion space above your liquid in carrying this commodity to take care of expansion on the highway so that you have no overflow being forced out of the tank.

The Court: Then by "marker capacity" you mean the maximum capacity of the tank consistent with this small tolerance for expansion?

The Witness: That is correct.

By Mr. Sarnier:

Q. Who supervised the amount of liquid which was loaded in your tanks?

A. The loaders at the various refineries, pipe line terminals, or quarter barge terminals.

Q. Were these supervisors your employees, Mr. Kahley?

(28) A. No, it was not. The loading is done strictly by the employee of the party furnishing the product.

Q. Now do you know whether in 1951 your company operated any of its vehicles carrying a weight in excess of those prescribed by the laws of the various states in and through which your vehicles were traveling?

A. I do know that we exceeded the weight laws in the State of Pennsylvania. I also know that we did have a few fines in some of the other states.

Q. Now I note, Mr. Kahley, from Paragraph 9 of the stipulation of facts that you were fined 746 times in the year 1951 for carrying overloaded weights, and also from the stipulation breakdown of the number of fines per state. Are you familiar with the facts which are contained in the stipulation, Paragraph No. 9?

A. Yes, sir.

Q. From these facts can you tell us how many times your company operated overloaded vehicles in these various states?

A. Could you break that down into states?

Q. All right. Now turning to Pennsylvania first, I note that there are 711 violations noted for Pennsylvania. Were there more or less times that your company operated overloaded vehicles in 1951 than this 711 times for which your company was fined?

A. There were many more times.

(29) Q. Do you know how many more times?

A. I would say that during the summer months in the State of Pennsylvania 60 per cent of our loads were overweight. During the winter months at least 75 per cent of the trips in Pennsylvania were overweight, according to the Pennsylvania statutes.

Q. Do you know the reason why there was a difference between the 60 and 75 per cent?

A. Yes. Basically our 4500 galon tanks, which were the smallest capacity we had, were legal in handling gasoline in the State of Pennsylvania—but only gasoline. During the winter months the gasoline consumption by the public is greatly reduced but the fuel oils, domestic fuels as well as industrial oils, are greatly increased for heating purposes. With full utilization of our equipment in summer and winter time, it was only natural that we be more in violation in winter time.

The Court: I think Mr. Sarner asked you whether, you know, and I would like to ask whether you knew at that time that it was in excess of that.

The Witness: Yes, I did know.

The Court: Of the state law?

The Witness: I did.

The Court: And you were just taking a calculated risk that you would be caught, so to speak, in a per-

centage of the number of violations that actually happened?

The Witness: That is correct.

(30) By Mr. Sarner?

Q. Now, Mr. Kahley, when I have been speaking of operating overloaded equipment in Pennsylvania and when you said that it was 60 or 75 per cent of your trips in Pennsylvania in 1951, are you referring to exceeding the 45,800 maximum gross weight plus the five per cent leeway, or are you referring to any other aspect of the gross weights?

A. No, I am speaking generally of exceeding the 47,250 pounds. Most states do have restrictions pertaining to axle loads. However, in the bulk liquid hauling business you are not very apt to run into an axle overload. You are not like a dry freight cargo carrier. Your truck is basically engineered and you have a liquid load that is a constant load over each unit. There are rare occasions when you could be in violation on an axle overload wherein a particular tractor and trailer were attached and be perfectly legal. Then through a breakdown or some emergency on the road, you would have to change the tractor and that may not be engineered exactly the same, it may be a few hundred pounds heavier.

In these remote cases we could encounter a violation other than for gross weight. However, on our fines in Pennsylvania they were all for exceeding the gross weight.

Q. Well, now turning to New Jersey, Mr. Kahley, I note that in Paragraph 9 of the stipulation we have set forth that your company paid a certain amount of dollars for seven fines. (31) Now from that information do you know how many times your company was in violation of the New Jersey statutes?

A. Well, I would say that quite often above those seven times we were in violation in the State of New Jersey because of the reciprocity agreement between Pennsylvania and New Jersey.

Q. Will you explain what that is?

A. Well, New Jersey had a 60,000 pound gross weight limitation. However, they would not recognize anything beyond our 45,000 pounds in Pennsylvania. On any number of occasions our particular license vehicle in Pennsylvania would be picking up a load of product in New Jersey or going from Pennsylvania into New Jersey and he would be well under the 60,000 pounds prescribed by the State of New Jersey but be in excess of the 47,250 pounds permissible in the State of Pennsylvania. So I would say there were many, many times that we were over the Pennsylvania limit but——

The Court: In excess of the 7 times?

The Witness: Yes, quite a number due to that reciprocity arrangement. But at no time——

The Court: Were there any in excess of 60,000 pounds?

The Witness: I know of no violations that we have ever had in excess of 60,000 pounds in any of our operations?.

By Mr. Sarner:

Q. Mr. Kahley, to continue with that thought, am I correct in understanding your testimony to mean that if you operated your vehicle which had a Pennsylvania registration in New Jersey, if (32) you exceeded 47,250 pounds you were in violation of the New Jersey law?

A. If you exceeded 45,000 pounds——

Q. Forty-five thousand.

A. ——they did not allow you the tolerance of Pennsylvania.

Q. Although if you had a New Jersey registration vehicle, what would have been the maximum amount?

A. Sixty thousand pounds.

Mr. Sarner: Will you mark these two exhibits, please.

(Petitioner's Exhibit Nos. 9 and 10 marked for identification.)

Mr. Sarner: Your Honor, I don't recall whether I offered this model in evidence, but I do so now for whatever benefit it will aid you.

Mr. Armstrong: I have no objection.

The Court: That is Exhibit 8 for identification. It will be received.

(Petitioner's Exhibit No. 8 received in evidence.)

By Mr. Sarner:

Q. Mr. Kahley, I show you two documents which have been marked Exhibits 9 and 10 and ask if you can identify these.

A. Yes. These are notices of overweight violations in (33) the State of New Jersey, one being for 50,110 pounds and the other one for approximately 54,000 pounds.

Q. They were notices with respect to what year?

A. 1951.

Mr. Sarner: Your Honor, I offer these two notices of fines with respect to New Jersey which have been marked Exhibits 9 and 10 for identification into evidence.

Mr. Armstrong: No objection.

The Court: Are those notices of violations or of fines? Is that similar to a traffic ticket? Is it issued before the sanction is imposed?

Mr. Sarner: Well, maybe Mr. Kahley can answer that.

The Witness: Yes, they are copies of the summons. And from that, of course, we pay our fine and proceed on.

Mr. Armstrong: No objection, Your Honor.

The Court: It will be admitted.

(Petitioner's Exhibit Nos. 9 and 10 received in evidence.)

By Mr. Sarner:

Q. Now with respect to the other five fines in New Jersey, do you know what they related to?

A. We looked through our records and I could not locate any particular summons such as exhibited here. However, in quite a number of cases all you receive is a telephone call from the driver with the arresting peace officer and he tells you you are (34) in violation, please remit. So of course it was a matter of mailing the check to them and the papers with—well, it could have been forthcoming or we may have mislaid them. There were a total of seven.

Q. To rephrase the questions which Judge Raum asked you, do you know of any occasions in 1951 when your vehicles exceeded the 60,000 pound requirement prescribed by the New Jersey statute?

A. No, I do not know of any.

The Court: Could there have been?

The Witness: No, there could not have been.

By Mr. Sarner:

Q. Now I also note from Stipulation No. 9 that in the remaining states of Maryland, Ohio, Virginia, and Delaware, your company paid a total of twenty-eight fines in 1951 for violating the statutes of those states with respect to operating overloaded equipment. Were there more than twenty-eight occasions in these states for which you were fined on which your vehicles operated overloaded equipment?

A. No, I know of no other violations other than those set forth. They basically had permitted you the 60,000 pounds. If there were any included in addition to these that were set forth, I would not know of them because I

feel that any of those as set forth were inadvertent overloading fines which could have been caused by, well, the example that I previously gave pertaining (35) pertaining to the change of a piece of equipment or some of the other reasons, that due to temperature changes that causes inadvertent overloading.

The Court: Would it not be unusual that your driver would be caught in every one of the violations?

The Witness: Yes. I say I know of no violation when these particular fines—when we ran into these violations I did not know that they would be in violation prior to picking up that load or during the loading process.

By Mr. Sarner:

Q. Well, I think we can clarify that aspect of the inadvertent overloading—I think that is the phrase you mentioned. But before we do, Mr. Kahley, am I correct in understanding your testimony to have been that there were times in 1951 when you consciously knew that your vehicles were overloaded and also there were times when they were overloaded when you didn't know about it?

A. That is correct.

Q. Now were those both conscious and inadvertent—I will use that term—overloadings confined to any of the particular states in 1951?

A. The conscious overloading was confined to Pennsylvania and New Jersey wherein the reciprocity arrangement existed between Jersey when we would not be recognized with Jersey's weight with the Pennsylvania tag. In the other states they were (36) inadvertent.

* * *

(37) Q. Mr. Kahley, before we adjourned for lunch you had testified, if I understand you correctly, that you both knowingly on the one hand and inadvertently on the other operated equipment which exceeded the maximum

weight laws of various states through which your vehicles were traveling. I would like to take up now the factors which you later found out caused your equipment to be overweight without your knowledge at the time. Could you give me an illustration or several illustrations of this which was in your experience in 1951?

A. Yes. In the loading process of the truck itself, as I mentioned before, the trucks are loaded to a marked capacity. The shipper wants to definitely make sure that his customer is receiving full weight or full gallonage. A tendency of the supervisor loading is to more than just float this marker and make sure that if is to the marker, or generally slightly above. Now that would cause a variance in going above to some number of (38) gallons and in turn be that much more weight.

One of the basic reasons why the loader does this is due to the fluxuations in temperature in going from a refinery to the point of destination. If the temperature does drop, in turn you will have a shrinkage, so to speak, of the product and then their customer is complaining to them of short weight. Therefore, they do load them in excess slightly so that the marker is full upon delivery at destination.

Mr. Armstrong: Your Honor, I move to strike this testimony. It is too general. He is not testifying to anything that he has knowledge of. He is not testifying to any facts that he has knowledge of. It is just general testimony and——

The Court: Leave it in the record. You may cross-examine on it.

The Witness: I have seen the trucks loaded above marker capacity in the loading of it. The other thing, some other reasons where he may have inadvertent overloading is on the change of temperature which you would encounter, rain or snow in freezing tempera-

ture or at the point of freezing temperature wherein the unit may leave, be perfectly legal, and in going over the highways pick up that much snow and ice that would cling to the vehicle and cause you to be overweight.

In most cases the refineries do not load this material by weight, that is by a scale. There are very few refineries or loading points who uses scales. We therefore are guided by average (39) weights per gallon of product. As an example, Bunker C, which I testified previously, weighs approximately eight pounds to the gallon. We have handled Bunker C that would weigh anywhere from seven and a half up to eight and a half pounds per gallon. We have no way of determining what that is other than the average eight pounds per gallon. So if you are loading the commodity and it is a half pound per gallon over that weight, we could very easily have inadvertent overloads.

The one other case that I had mentioned before that could cause an inadvetent overload is on the substitution of a particular tractor unit together with that trailor wherein from an engineering design it would not be on perfect balance so far as those axles are concerned and could also cause an inadverfent overload.

By Mr. Sarner:

Q. Now if I understand your previous testimony correctly, with the exception of Pennsylvania and New Jersey your violations in these other states were of this type that you have just mentioned?

A. That is correct.

Q. Now addressing yourself only to Pennsylvania——

The Court: That is, so far as you know.

The Witness: So far as I know.

By Mr. Sarner:

Q. Well, with respect to the operations of your company (40) in 1951, you would know all the facts with respect to the overloaded equipment which was being operated?

A. Yes, sir.

Q. Now, addressing yourself only to Pennsylvania for the moment, Mr. Kahley, do you know whether your conscious overloadings in 1951 were more or less frequent than your inadvertent?

A. They were more frequent than the inadvertent.

Q. Now was this practice of knowingly exceeding the Pennsylvania weight limitations confined to 1951 or did it exist prior thereto?

A. As I testified before, in fact during the war years the War Production Board had set forth a particular sized tank that should be suitable for the entire United States, and at that time the manufacturers were instructed to build tanks of no less than 4500 gallon capacity.

Mr. Armstrong: I object to that as hearsay.

The Witness: It is not hearsay.

The Court: He may state what instructions his company received.

Mr. Armstrong: Well, that is not what he testified to, sir. He testified that the manufacturers received such instructions.

The Witness: May I answer the question?

The Court: I would like to hear from counsel for the Petitioner.

(41) Mr. Sarner: Well, I think the substance of what Mr. Kahley stated so far was to the effect that because of regulations of the War Production Board he could not purchase tanks other than 4500 gallons.

The Court: He may state the kind of trucks or equipment that was available to his knowledge.

Mr. Sarner: All right, Your Honor.

The Witness: As I testified before, due to the fact that we could purchase only 4500 gallon tanks or larger, which I understand was an order of the War Production Board, we of course violated knowingly from the war years on up through 1951.

By Mr. Sarner:

Q. Well, now, prior to 1951 what was the experience of your company, if you know, with respect to the enforcement of the weight laws by the Pennsylvania authorities?

A. During the war years and up until the latter part of 1950, although our trucks were overweight we were not stopped by the Pennsylvania authorities and were permitted to carry overloaded load on the highways in Pennsylvania. However, in the latter part of 1950 and the early part of 1951, we were then apprehended by the police officials and fined for overloaded vehicles.

Q. Now you know the amount of fines. Do you know what your company paid in 1951?

A. Yes, sir.

(42) Q. In Pennsylvania?

A. Approximately $37,000.

Q. Now may I ask you what reason or reasons, if any, you had in consciously using overloaded equipment in Pennsylvania when you were subject to the payment of those fines?

A. Well, hauling the overloaded equipment was the practice in the industry because of not being restricted for those prior years.

Mr. Armstrong: I object to that. I don't think this man is competent to testify as to what was the widespread practice of the industry. He can speak only with respect to his own organization.

Mr. Sarner: Well, I don't think that is so, Your Honor. I think he can testify as to what the other people in the industry were doing and what he had to do to combat or be in accord with the individual practices as such.

The Court: I would think that a condition could be so notorious that it would be within the knowledge of a witness. He need not state what the conditions were, but he can state what certain practices existed.

Mr. Sarner: All right.

By Mr. Sarner:

Q. You had started to say, Mr. Kahley, why your company operated this overloaded equipment when you knew that it was in excess of the amounts allowed by Pennsylvania law.

(43) A. Well, if we had attempted to shall I say change our equipment, it would have meant the scrapping of our entire fleet which would have been wholly uneconomical. It is doubtful if equipment of smaller capacity would have been available at the minute to make that type transformation. At the same time our competitors were hauling exactly the same amount of product more or less generally. Therefore from a competitive basis if we would have had to compete with the smaller tank truck, naturally we would have had to raise our rates and priced ourselves out of business.

Q. Well in that connection, how is your pay load figured? Is it figured on—well, how is the pay load figured?

A. Well of course everything is predicated on distance, so much per gallon for hauling between two points.

Q. Then if you hauled a smaller amount of gallons, would that lower your revenue from that trip?

A. Yes. We are paid on a per gallon basis, so naturally if we lowered it our revenue would be smaller.

Q. Well, now, you were a lessor of equipment to the certificated carriers, were you not?

A. That is correct.

Q. Did you consider an amplification of this reduced pay load charging more to your lessees in 1951?

A. Well, we considered it but knew the competition would force us out of the field if we had tried to charge a higher (44) rate than what the lessor was collecting. Naturally he could not pay us more than what he was receiving for hauling this product.

The Court: Did that mean you would have to operate at a loss or that your profits simply would have been diminished?

The Witness: We would have to operate at a loss at that time in order to operate a legal truck in Pennsylvania.

By Mr. Sarner:

Q. Did you discuss the problem of being automatically compensated for operating within the legal limits of Pennsylvania?

A. Yes, I spoke to the people to whom we had equipment leased. Of course they have to be fearful themselves of trying to increase any rates for fear of driving that business back to private carriers, meaning the refineries themselves or to the rails where they would price themselves out of the field and competition would take over.

Q. Do you know whether any consideration was given by the industry as a whole whereby all the carriers would increase their rates and abide by the Pennsylvania weight limitations?

A. I know there were discussions at meetings which I had sat in together with other carriers discussing this possibility. However, as I say, competitively they felt it would be unwise and would price them out of business.

Q. Can you amplify that a little more, Mr. Kahley, when (45) you say "would price them out of business"? To whom would the business be referred?

A. Either that the refineries themselves would put on their own equipment and haul it themselves as private carriers, or the possibility of the rails regaining the business.

Q. Now you mentioned earlier the problem of your existing tank capacity equipment. Would it have been possible to decide from the revenue factor which you have just mentioned—say you were carrying anything other than gasoline, for example let us assume you were carrying Bunker C, to load a smaller number of gallons into your 4500 gallon tank and therefore be within the legal limits?

A. Well our experience in trying to operate with a partially loaded tank we found was a very unsafe operation. Within these tanks of course there are levels, and when you have a partially filled tank there is more surge inside that tank through the motion on the highway and that in turn causes a cracking of the baffles which would then cause leaks and the possibility of spillages on the highway.

In bringing a vehicle to a stop with this tremendous surge inside on a partially loaded tank you have the danger that you feel the unit is just about stopped and then this surge hits your tank and drives you forward a few feet and could very easily cause an accident, forcing you into a vehicle in front of you. A partially loaded truck on the highway gives a surge which (46) could very easily cause the vehicle to be overturned. It has been our practice that it is too unsafe to load a partially loaded truck.

Q. Since you state it was your practice that it would be unsafe, did you consider the possibility in 1951 of acquiring smaller sized tanks so that you could loan them to capacity and still stay within the weight limitations of Pennsylvania?

A. Well in 1951, basically there were no engineering changes from the equipment so far as lightening the equipment.

Q. I am talking about the size at the moment. Did you consider the possibility of assuming smaller sized tanks, say of 4,000 gallons or 3,500 gallons?

A. No. We inquired and found that they would have been available after those years. However, as I pointed out before, it would have been very uneconomical for us to scrap our entire fleet. Again, if we hauled the 4,000 gallon load and our competitors were hauling a 4,500 gallon load, it would put us in an uncompetitive class with them.

The Court: Was each of these tanks a single unit or was some tank compartmentalized, so to speak?

The Witness: There were both single compartment tanks and multiple compartment tanks.

The Court: In the case of multiple compartment tanks if you just loaded some of the compartments, you would not have the problem of surge you were speaking of.

(47) The Witness: You mean if you left the one tank empty entirely?

The Court: If you loaded the two end compartments and left the middle compartment unloaded, would that be a feasible thing to do?

The Witness: You would not have the surge but in turn you would have approximiately one-third less gallons that you would be hauling, so from an economical standpoint it would put you away below.

The Court: I understand that, but I am addressing myself to the problem of danger that we were discussing before in a partially loaded tank.

The Witness: You would not have the surge safety factor involved wherein the compartment itself was entirely empty.

By Mr. Sarner:

Q. Insofar as your vehicles were overloaded and you considered the possibility of a partial loading, was it under consideration that the partial loading would be to the extent of one-third less of the original amount?

A. Approximately one-third.

Q. For the compartment?

A. That is right.

Q. Were you familiar since your connection with the company in 1945 with any pending legislation which was being introduced in the State of Pennsylvania with respect to the weight (48) laws?

A. Weight laws, yes. We were very aware of the industry trying from 1947 on to secure higher weights. As a matter of fact, the 45,000 pound weight law under which we operated was a temporary war measure and was finally enacted into law in 1945. At each session of the Legislature there were bills sponsored to increase the weight in the State of Pennsylvania to bring that weight restriction up to our surrounding states.

Q. Now did this legislation play any important part in your determination, your decision not to acquire smaller equipment?

A. Yes, it did, as much as if we had gone abroad and tried to secure smaller tanks and secured smaller tanks. We, shall I say, were very optimistic as to getting weight relief in Pennsylvania. With that hanging above us all the time, we would have immediately upon receiving weight relief found ourselves with an obsolete fleet. Each two years that the Session did meet we did weel that what we presently were operating would become legal at that Session of Legislature to that extent. The bill passed both houses and was finally vetoed by the Government.

Q. Did your operations outside of Pennsylvania play any part in the type of equipment you had to have in 1951?

A. Yes. Our lease arrangement with these various certificated carriers calls for us to give them service in peak seasons; otherwise, we would be of no value to them. What could happen (49) particularly during the winter season, this business being rather seasonable, the source of supplies can very readily change to freezing of barge points and a secondary source of supply would have to be set up.

As an example, we may be pulling out of a pipe line terminal right here in the eastern part of Pennsylvania, and due to not having the product in that terminal due to weather conditions, they may assign a secondary source of supply in the State of New Jersey. Our trucks have to be flexible enough to move wherever that source of supply may be.

Q. Was it necessary that your trucks be available for use in other states?

A. Oh, yes. That is generally true within our whole industry; that we must have the flexibility to assist them in whatever states that we are operating.

Q. Could you have used the smaller trucks in these other states?

A. Not economically. They could have been used. However, the rates in those other states where they had the 60,000 pound-weight law were predicated on hauling a 60,000 pound weight load. Naturally if we had to go over and send a fleet of trucks hauling 45,000 pounds, we would be at a distinct disadvantage and lose money.

Q. Do you know, Mr. Kahley, whether in 1951 any tanks were engineered of the same capacity as those which you had but (50) of a lighter metal such as, say, aluminum?

A. No. Up until 1951, basically the tanks were made of iron and steel. The particular thickness of the iron and steel is prescribed by regulations set forth by the Interstate Commerce Commission and regulatory bodies. Now there were some aluminum tanks available in some states, but not nation-wide. It was not approved by the state regulatory bodies on aluminum tanks.

Q. Do I understand you correctly when you state that none of the lighter material tanks would have been available in 1951 for your company?

A. That is correct.

Q. Now I call your attention to Paragraph 10 of the stipulation wherein we said that on a substantial number

of your Pennsylvania trips your company knowingly operated without a permit vehicles which exceeded the maximum gross weight prescribed by the Pennsylvania statute. Did you know, Mr. Kahley, in 1951 whether or not Pennsylvania had any provisions in its law for obtaining a permit to operate a vehicle in excess of the 45,000 pound maximum?

A. Yes, they did have the provisions. I did know that most all states that have weight restrictions do have procedures to secure a permit for an overloaded vehicle.

Q. Did you in connection with your company consider the possibility of obtaining permits in 1951 for the trips which you knew would be made with loads exceeding the legal limits in (51) Pennsylvania?

A. Yes, we considered that possibility. However, it usually entailed or would entail several days to secure the permits. Then it is strictly at the discretion of the local township road authority whether or not that permit would be granted. I might also state that a permit is granted for one particular load. Here was a vast majority of our loads, so it would have been impractical for us to secure the permit because of the delays. Our customers wanted the load of material, and we just would not have been able to give them any service.

Q. Did the cost of the permit in any way play a part in your decision?

A. Yes. The permit is granted, and on the overweight you must pay on a ton-mile basis so that basically the size equipment we were running would generally cost the same as the overload fine. So I say we took our chances and risked the overload fine rather than run into the delays of secure the permits.

Q. Did your interstate carriage have any effect on your decision not to seek the permits each time you came into Pennsylvania?

A. Yes. If we picked up a load in New Jersey say of 55,000 pounds and got to the Pennsylvania border and it would be a matter of maybe a couple days to secure the

permit, again that would not be giving the customer the kind of service that he would want.

(52) Q. Now, Mr. Kahley, were you familiar with what the practice of your competitors and other people in the industry was with respect to obtaining the permits?

A. Yes. We had discussed that at various meetings and all came to the same conclusion that it was not feasible to attempt to get the permits.

Q. Now were any other sanctions imposed on your company in Pennsylvania in 1951 other than the payment of the fines which you have indicated with respect to operating the overweight in vehicles?

A. No.

Q. Am I correct then in understanding that the fine was the only sanction?

A. That is all.

Q. Now in this connection, Mr. Kahley, do you know whether in 1951 any of your vehicles which were overweight for which either you were fined or not fined had to be unloaded in 1951 in order to remove the excess weight?

A. No, we never had to unload an overloaded piece of equipment.

Q. Was that true only in 1951 or was it true also in prior years?

A. It was true in prior years and on up until 1956, until the enactment of this new Pennsylvania weight laws.

Q. Is this true for Pennsylvania alone or for the other (53) states?

A. This is basically true for Pennsylvania.

Q. What has the experience of your company been in the other states?

A. Our experience in the other states, I do not recall of ever having to unload a load. I do know of other operators where they did have to unload.

Q. Do you know of any tanks of your competitors in Pennsylvania or other members of the industry which were required in Pennsylvania in 1951 to be unloaded?

A. I do not know of any, and I doubt if there were any. I believe that would have been discussed at some of our conference meetings if it had been the case.

Q. You would have known about it if it had occurred?

A. I feel reasonably sure it would have come up in a discussion at some of our forums.

Q. Were any of your drivers, if you know, arrested or imprisoned or were their operator's licenses suspended for operating your overweight vehicles in 1951?

A. No, they were not. All that was necessary was that the fine be paid.

Q. Mr. Kahley, we have stipulated in Paragraph 9 that you paid in 1951 the total sum of $41,060.84, representing fines and costs for operating overloaded equipment. Who paid these fines?

A. Our company.

(54) Q. Were you reimbursed for this sum or any part thereof by your lessees?

A. No, sir.

Q. How long have your rental arrangements with your lessees been in effect?

A. Since 1945.

Q. Were the agreements in prior years substantially the same or different from the Coastal agreement, Exhibit No. 1, which you saw?

A. No, they were substantially the same. In there it sets forth that we would absorb any fines.

Q. Then how did your lessees and you treat the responsibility for these fines?

A. It was solely our responsibility and we had to pay.

Q. Did you have any understanding or agreement that they would reimburse you for $41,000 or any part thereof?

A. No, sir, they would not reimburse.

Q. Mr. Kahley, I show you Exhibits 3 and 4 of the stipulation which are the notices of the fines addressed to certain named individuals. Will you tell us who those individuals are?

A. They are drivers on our pay roll.

Q. Were all your Pennsylvania fines in 1951 addressed to the driver or were some of them addressed to your company?

A. All the fines in Pennsylvania are addressed to the driver.

(55) Q. Who paid these fines, the company or the driver?

A. The company paid all fines.

Q. Can you tell us the reason why the company paid these fines?

A. Well in our labor contracts with the American Federation of Labor it so sets forth that any fines that are not under the control of the driver must be paid by the company.

Q. I call your attention to Article 8(B). Will you just read the first line or so of that and answer whether or not that is the provision to which you refer?

A. "Whenever employees are required to operate overloaded equipment or are instructed by foreman"—do you want more than that?

Q. That is all right. That is Article 8(B) of Exhibit No. 2. Is that the provision to which you refer?

A. That is correct.

The Court: Who would pay a fine for a speeding charge, for example?

The Witness: That is the responsibility of the driver.

The Court: He would pay that?

The Witness: He would pay that fine. Parking violation or speeding or reckless driving, that is entirely up to the driver; we do not pay any of those.

The Court: Overloading was due to your decision and not the driver's, and therefore you paid the fine?

(56) The Witness: That is correct.

By Mr. Sarner:

Q. On that, Mr. Kahley, the conscious overloading was due to your decision, is that right?

A. That is right.

Q. Did you mean to answer Judge Raum by indicating that the inadvertent or unknowing loading was due to your decision?

A. No; the inadvertency would not be due to my decision. However, the union contract could do nothing but force me to pay that fine. Whether it was inadvertent or conscious we would have to pay it, regardless.

Q. Regardless of who was at fault?

A. That is correct.

Q. Do you know which peace officers in Pennsylvania in 1951 were charged with the responsibility of enforcing and did enforce the maximum weight laws?

A. Yes, the State Police and the local municipalities. I might also add that our records indicate that approximately 60 per cent of our violations on which we were apprehended were made by the State Police and 40 per cent of them were made by the local municipalities.

Q. Mr. Kahley, I would like to turn back to the question of permits again. Do you know whether it would have been possible on all of your trips to obtain a permit?

A. No, I don't think we would have been able to obtain (57) permits because as I understood it is for an occasional load that they will issue a permit. If I were coming back in there day after day for the same piece of equipment and same load, I am quite sure I would have been turned down so far as being granted a permit.

Q. Was the question of obtaining permits discussed by the industry as a whole at any meetings where you were present?

A. Yes, it was discussed.

Q. What conclusion was reached by your industry with respect to this practice?

A. I think I did have that in the testimony before, that the entire industry—and when I speak of the entire industry I am speaking of those with whom I did business with—were all of the same opinion that it was not feasible to secure permits.

Q. Would it have been possible for you to have, let us say, sort of a permit for each overloaded vehicle whereas the rest of the industry did not?

A. No, I don't think it would have been feasible for us inasmuch as I have testified before that we took our chances on running the overloaded truck and were only apprehended a small percentage of the time. For us to have that expenditure for each and every load, I am quite sure our competitors again would have had a distinct competitive advantage in not buying a permit.

The Court: What was your average load?

The Witness: The average load?

(58) The Court: Yes.

The Witness: In Pennsylvania?

The Court: Yes.

The Witness: If we haul 4500 gallons of gasoline, we were under the Pennsylvania state regulations of 47,000 pounds. If we had 4500 gallons of fuel oil—in other words, forty-seven on a load of gasoline, that is basically six pounds per gallon. So if we handled domestic fuel, 4500 gallon weights of 4500 pounds against gasoline so that there we would weigh approximately 51,000 pounds. If we loaded kerosene that would be three-quarters of a pound per gallon more than gasoline, so 4500 gallon would be roughly 3600 pounds above the Pennsylvania weight. On the eight pound per gallon it would be approximately 8,000.

By Mr. Sarnet:

Q. But in all cases it would be under the 60,000 pounds?

A. That is correct.

Q. And that was the maximum prescribed in the other states through which you operated?

A. That is right.

Mr. Sarner: No further questions.

Cross-Examination.

By Mr. Armstrong:

Q. Where is your company located, Mr. Kahley?

A. Lancaster, Pennsylvania.

Q. And that is where your vehicles are kept?

(59) No, we have terminals in Paulsboro, New Jersey; Woodbridge, New Jersey; Norristown, Pennsylvania; of course our main office in Lancaster; Ducansville, Pennsylvania; Midland, Pennsylvania; Irwin, Pennsylvania. That is it for 1951.

Q. Well, that is confined——

A. Excuse me, I have a correction. In 1951 there was no Woodbridge terminal in New Jersey.

Q. All the questions I am asking you pertain to 1951.

A. Yes, sir.

Q. Now it has been stipulated that your vehicles made 77,385 trips in the State of Pennsylvania in 1951.

A. Yes, sir.

Q. Could you say what percentage of those trips were made for hauling gasoline, what percentage of those trips you hauled kerosene, and on what percentage you hauled these other two items you mentioned?

A. Our gasoline would be approximately 30 to 35 per cent of our total volume. I would say that on the heavy oils which I referred to there as bunker oils would be approximately 35 per cent cent of our volume. The balance of approximately 30 per cent would be the domestic fuel oils and kerosene.

Q. Well, now, you said that you would have had to scrap your whole fleet if you had converted to larger equipment, larger tankers. Now could you not have maintained

this fleet and hauled gasoline in the trucks you had and then on the hauls of the heavier (60) fuel oils used the tankers which are separated into compartments and just used two of the three compartments for the heavy oils?

A. I think I testified there that on those jobs that were compartmented it would have meant a cutting of our capacity of approximately one-third. It would not have been economical.

Q. Excuse me. It would not have been economical on that particular load?

A. That is correct.

Q. For your over-all business you could have used the same vehicles you had, could you not?

A. Let me try to answer you this way: At the time during 1951, we had approximately—can I refer to the stipulation to the number of tanks—112 tanks, I believe, in operation. One hundred twelve tanks.

Q. You mean semi-trailers?

A. Yes. That is the tank that you are speaking of the possibility of being compartmented. I would say that of that 112, not more than twenty of them were compartmented jobs. The rest were all single compartments. As I mentioned to you, 35 per cent of our product is handled on this heavy oil. That has to be in a single compartment tank; I mean you cannot have multiple compartments. It is a heavy oil and clings too much to the sides and causes a problem in loading and unloading.

On the gasoline, in order to operate legally the 4500 gallon (61) job is a single compartment tank. Otherwise if it was a compartmented tank, it would weigh a whole lot more because of your baffles, valve setups, and everything else.

Q. Do you use the same tanks for all of these fuels, or do you use only one?

A. We use only the same tanks for kerosene, gasoline; and light domestic.

Q. You never put heavy fuel in the compartmented tanks?

A. In the compartmented tanks, no, we do not.

Q. Did you operate any vehicles in and around Philadelphia?

A. Out of the Philadelphia refining area, yes, sir.

Q. Would that include Montgomery County, Bucks County, and Delaware County?

A. Yes, sir.

Q. You said that the loading was supervised, I believe, by the person who furnished the load. In other words, that would be the refinery, is that correct?

A. Refinery or pipe line terminal.

Q. Now how would you know whether or not that truck went out overloaded? How would your company know?

A. Well, if I sent that truck in for a load of fuel oil and my instructions are that that truck is to be loaded to top capacity—that is, to our marker capacity as explained before—and if it is a 4500 gallon tank and it weighs seven pounds to a gallon, and the weight of my vehicle, I know that it is overloaded by adding the two factors together.

(62) Q. Yes, but didn't you say it was a practice of loaders generally to overload the vehicles?

A. In floating the marker, that is correct.

Q. What do you mean by "floating the marker"?

A. As I explained before, there is a marker in this tank so that your customer receives, or his customer receives full gallonage upon point of destination. They will make sure that that marker is more than floated because the change of temperature that you will have causes a shrinkage within that tank. In other words, there may be a load loaded in Philadelphia, say, on a nice hot summer day. The product coming out of that tank would be loaded, say, at 60 degrees. So when it gets up to the point of destination the outside temperature being higher would cause it to be higher, expand.

Now that is just in reverse in the winter time. It could be loaded at the 60 degrees and go through zero, where in turn you would have a strengthening.

Well, the refinery does not want their customer to feel that he is getting a shortage, so to make sure it is only human nature that the loader in turn will make positively sure that his customer is getting a full tank when it gets to the point of destination.

Q. Did you also let that three per cent air space?

A. Yes, sir.

Q. So on the 4500 gallon tanks, would your marker be up (63) to a point that was up to that three per cent air space point?

A. You could very readily have more than three per cent, I mean within a fraction. In other words, the Interstate Commerce Commission sets forth that it must be three per cent expansion or more to take care of the safety factor of expansion. So normally I say on a 4500 gallon tank where the marker is set on a 4500 carrying capacity tank, the possibility of your three per cent would probably be three and three-quarters, three and a half per cent rather than three per cent. You must have three per cent tolerance in there. I mean you have your tanks calibrated on even gallonage, and a few gallons above that is your tolerance.

The Court: How significant was that overloading due to the shipper's desire to see that the consignee had a good bargain for it? Was that in terms of just a few extra gallons or was it a significant amount?

The Witness: No, I don't think it was significant.

The Court: So that excuse was not the thing that caused the fines?

The Witness: No, indeed not, to any great degree. It could mean a matter of ten or fifteen gallons. Eight pounds per gallon would be one hundred pounds.

The Court: That would be comparatively inconsequential then? If you had a violation, you would have had a violation without that in most cases?

(64) The Witness: In most cases in Pennsylvania, yes.

By Mr. Armstrong:

Q. Do you know approximately how many carriers were operating in Pennsylvania in 1951?

A. Approximately?

Q. Yes.

A. You mean certificated carriers or all carriers?

Q. All carriers, such as your organization.

A. Well, when you say "all carriers" do you mean the refineries?

Q. No, such as your organization and larger.

A. Well, such as our organization as a rental company, I only know of two in Pennsylvania.

Q. Well, what about common carriers then?

A. In Pennsylvania I would say that there was approximately a dozen in petroleum——

Q. I am not talking about petroleum, I am talking about in the general field hauling all sources of ——

A. You mean dry freight carriers and so forth?

Q. What?

A. You mean dry freight carriers and so forth?

Q. I don't know that term.

A. The term "dry freight"?

Q. Including those.

A. I would not venture a guess on dry freight.

(65) Q. Would you say your company is small, large, medium, or what compared to the other carriers of petroleum products?

A. I would say a fairly large company.

Q. In 1951?

A. Yes.

Q. Now that comparatively dozen that you know of, that amount being in?

A. Yes. In Pennsylvania in 1951, I would say that there were possibly three larger than ourselves in Pennsylvania.

Q. But many refineries had their own vehicles, is that right?

A. Excluding the refineries own fleets of trucks; I am not speaking of them. Atlantic Refinery has a very large fleet.

Mr. Armstrong: I have no further questions.

Re-Direct Examination

By Mr. Sarner:

Q. You started to answer there were three carriers that were possibly larger than your company in 1951. Which three were you referring to?

A. The Leeman Transportation Company, their interest which includes Chemical Tank Lines, Inc., which I consider as one; Coastal Tank Lines; and E. Brooke Matlack, Inc.

Q. Then between those three companies and yourself, do you know the dollar volume of the business which those companies controlled?

(66) A. In 1951?

Q. Yes.

A. Well, I would have to venture a close approximation.

Mr. Armstrong: I object, Your Honor. This witness is not competent to answer that question.

Mr. Sarner: Counsel asked on cross-examination if he knew any larger companies.

Mr. Armstrong: I say he is not competent to testify as to how much volume of business these other companies have.

The Court: What is the purpose?

Mr. Sarner: The general purpose is to show that the companies which Mr. Kahley works for and has

knowledge of, and the industry witnesses here from the companies will testify as to this common practice in the trade of operating the overloaded equipment and the necessity for it and the competitive features, and I wanted to establish that Ms. Kahley's testimony and his experiences were substantially the same as what was true in the industry.

The Witness: Well, approximately $25,000,000.

Mr. Sarner: Just a moment.

The Court: On cross-examination he has already indicated that these other three companies are larger.

Mr. Sarner: Yes, sir.

Mr. Armstrong: Yes, Your Honor.

The Court: What is the point in showing how much (67) larger?

Mr. Sarner: We were not concerned with how much larger. We have no evidence here as to how large Tank Truck Rentals was except by number of equipment, if that means anything. I think that it is proper for us to show that Tank Truck Rentals and various other carriers represented the industry as a whole in this area.

Mr. Armstrong: How can this witness know the volume of business done by the other three carriers? He is not competent to testify.

Mr. Sarner: He can testify as to the fact he worked for all of these carriers. He worked for these carriers, he knows the fleet.

Mr. Armstrong: Not in 1951.

Mr. Sarner: Oh, yes, he did in 1951.

The Court: That is not the evidence.

Mr. Sarner: Yes, Your Honor.

The Witness: Yes.

Mr. Sarner: We stipulated that.

The Court: I have not read the stipulation with that much care.

Mr. Sarner: It was not pitched for that. Well, maybe we say who the lessees were.

The Witness: I testified to that.

Mr. Sarner: I guess we didn't stipulate who they were. (68) Well, Mr. Kahley did, I believe, in the early part of his testimony testify to the names of his lessees, and they are these companies that we are referring to.

Mr. Armstrong: They are not comparable to his organization. They are the lessees.

Mr. Sarner: Comparable in what sense?

The Court: Gentlemen, I think there is a quibble here. The objection goes to the magnitude of the operations: that is, goes to the question that seeks to elicit from the witness the magnitude of the business of his three larger competitors. The Government is objecting to that question on the ground that this witness is not in a position to know of his own knowledge the magnitude of these operations.

Mr. Sarner: The response of the taxpayer is that he is in a position to know because these were not only his competitors but also his own lessees, and therefore he did know the extent of their—well, we can ask whether he knew the extent of their nature or operation of their business.

The Court: As I inquired of you before, it seems to me it gets you no place in any event, even if you get the answer. You have already established that he has three competitors whose operations are of larger magnitude than his own. It seems your only interest is not to show the magnitude of those operations of those

three competitors but simply to show what the practice of those three competitors was in relation to the problem; (69) namely, that they persisted in violating overloading provisions in the same manner that the Petitioner did.

Mr. Sarner: All right.

The Court: Even if you succeeded in getting from the witness his statement as to what the magnitude of the operation was, it would not be impressive to me. I am already satisfied from his testimony that the three competitors had operations that were larger than this Petitioner. From your point of view it seems that the important thing to establish is that those three competitors followed a similar practice.

Mr. Sarner: That is right.

The Court: How far that advances you legally is another matter. It seems to me that is the line that you want to achieve.

Mr. Sarner: Surely it is; that is right.

All right, Mr. Kahley, I think that is all. I have no further questions.

Mr. Armstrong: No further questions.

The Court: All right.

(Witness excused.)

Mr. Sarner: I call Mr. Kenneth R. Siechrist.

Whereupon,

KENNETH R. SECHRIST was called as a witness on behalf of the Petitioner and, having been first duly sworn, testified as follows:

(70) The Clerk: State your name and address, please.

The Witness: Kenneth R. Sechrist; 360 Old Orchard Lane, York, Pennsylvania.

DIRECT EXAMINATION.

By Mr. Sarner:

Q. What is your occupation, Mr. Sechrist?

A. I am Secretary and Treasurer of Coastal Tank Lines, Inc.

Q. What type of business is your company engaged in?

A. In the transportation of petroleum, coal tar, and chemical products by tank truck.

Q. How long have you been connected with the company?

A. I have been connected with the company since October 1949.

Q. How long have you been engaged in this type of business?

A. Prior to entering into the transportation field in the industry I was a certified public accountant and had done work with transportation companies as well as other companies.

Q. Then since 1949 you have been with——

A. Coastal Tank Lines.

Q. In what capacity were you employed in 1951?

A. I was Secretary and Treasurer of the company.

Q. What was the nature and extent of your duties and responsibilities as such officer in 1951?

(71) A. I was in charge of the financial and accounting data of the corporation. I was also a member of the board of directors.

Q. In 1951 were you familiar with the manner, the nature, the extent, and the operations of the company?

A. Yes, I was.

Q. Did your company operate under certificates of authority granted to it by the Interstate Commerce Commission or the state public utility bodies?

A. Yes, we were authorized both by the Interstate Commerce Commission and intrastate by various public utility companies.

Q. In what states, if you know, Mr. Sechrist, did your company operate principally in 1951?

A. We operated principally in Pennsylvania, Maryland, New Jersey, Delaware, Virginia, West Virginia, and in the various other states only on intrastate or interstate business.

Q. Well, were you engaged in interstate or intrastate business, or both?

A. We were engaged in both.

Q. Are you familiar with, say, the Leeman Transportation Company or Matlack, Inc.?

A. Yes.

Q. In what type business are these companies engaged?

A. In the same type business, which is the transportation of petroleum, coal tar, and chemical products by tank truck.

(72) Q. Do you know the taxpayer?

A. Yes, I do.

Q. Do you know the type of business it is engaged in?

A. Yes. They lease equipment to Coastal Tank Lines.

Q. What does that equipment consist of?

A. It consists of a tractor—that is, a truck tractor and a semi-tank trailer with a driver.

Q. Did you have any business dealings with Tank Truck Rentals, Inc., in 1951?

A. Yes, we did the entire year.

Q. What were those dealings?

A. They supplemented our equipment in times of rush periods in which we had a volume movement to make. They also helped out during the entire year, as we felt that we were required to give them business during the entire year in order to have more equipment available during the rush periods.

Q. Turning back to your own operations in the year 1951, Mr. Sechrist, do you know the approximate number of trips which were operated by your vehicles in the states you have mentioned in 1951?

A. We operated approximately 171,000 trips in 1951.

Q. Do you know the approximate percentage of your own trips for which Pennsylvania in 1951 was either the originating state or the destination state, or interstate carriage was in Pennsylvania?

(73) A. May I have that question repeated, please?

(The pending question was read by the reporter.)

The Witness: I understand you want to know the approximate number of trips that we operated having either Pennsylvania as a point of origin or point of destination.

By Mr. Sarner:

Q. Or solely within Pennsylvania?

A. We were traveling in Pennsylvania?

Q. That is right.

A. Approximately 67 per cent of our business was inter- and intrastate Pennsylvania.

The Court: And the remainder of the trips involved no contact with the state at all?

The Witness: That is right.

By Mr. Sarner:

Q. Are you familiar with the kind of equipment you owned and were operating in 1951?

A. Yes, I am.

Q. Will you tell us what that was?

A. We operated truck tractors and semi-tank trailers. Those trailers had a capacity of from 4500 to 5600 gallons.

Q. Was your equipment, if you know, Mr. Sechrist, similar or not similar to the equipment used and operated generally in the industry in 1951?

A. It was similar.

174) Q. Do you know how many pieces of equipment your company owned and operated in 1951 other than that which was leased, say, from Tank Truck Rentals or other possible lessees?

A. I believe we owned 147 truck tractors at the end of 1951, and we owned 174 tank trailers.

Q. As I understood you before, you supplemented that fleet of your own with leased equipment.

A. That is right, with leased equipment.

Q. Now, were you in 1951, Mr. Sechrist, familiar with the maximum gross weight requirements for this type of equipment in the states through which your company operated?

A. Yes, I was.

Q. Do you know whether in 1951 your company exceeded the weight limitations of any of the states by the operation of any of its own vehicles, not those which were leased?

A. Yes, we did.

Q. Taking up Pennsylvania first, as I understand your former testimony about two-thirds or 67 per cent of your total trips were into or through Pennsylvania.

A. That is right.

Q. Do you know in approximately how many of these Pennsylvania trips your vehicles exceeded the Pennsylvania laws? You don't have to give exact amount, just some percentage.

A. I would imagine it would be in the neighborhood——

Mr. Armstrong: I object. This man is imagining. (75) Either he knows or does not know, Your Honor.

By Mr. Sarner:

Q. Do you know on how many of your Pennsylvania trips you exceeded the Pennsylvania laws?

A. I actually do not know the exact number.

The Court: Was it your policy to fill your tanks to maximum capacity?

The Witness: Yes, it was.

The Court: When the tank was filled to maximum capacity, did the vehicle plus cargo exceed the——

The Witness: In some cases it did and in some cases it didn't.

The Court: What type of cases did it not, and which did?

The Witness: When we hauled gasoline we were legal, 4500 gallons.

The Court: What is the weight of gasoline?

The Witness: Gasoline weighs approximately six and one tenth pounds per gallon.

The Court: What is the weight of your vehicle, or tractor and tank as you call it?

The Witness: The tractor and tank will weigh in the neighborhood of 19,500 to 20,000 pounds.

The Court: That will give you roughly a total of 47,000 pounds.

(76) The Witness: That is right. The Pennsylvania weight law is 45,000 pounds gross weight with a five per cent tolerance, giving you a weight allowable in Pennsylvania without being subject to a fine of 47,250 pounds.

The Court: What other cargoes do you carry besides gasoline?

The Witness: Fuel oil, this heavy bunker oil, and we carried chemicals.

The Court: In the case of fuel oil and bunker oil, then a full load would exceed the weight limit?

The Witness: Was overweight, that is correct.

By Mr. Sarner:

Q. With respect to your operations in Pennsylvania, would you say that you had a considerable or inconsiderable amount of carriage of the bulk liquids other than gasoline?

A. We had carriage of it, but the majority of the heavier products were transported by leased carrier, which was Tank Truck Rentals, Inc.

Q. Now as a result of operating overloaded equipment in Pennsylvania, did your company, if you know, pay any fines to the Pennsylvania authorities?

A. Yes, we did.

Q. Would you say that your operation of overloaded equipment in Pennsylvania was in excess of the number of fines that you paid?

(77) A. Yes.

Q. Would you say it was considerably in excess or inconsiderably in excess?

A. I would say considerably in excess of what we actually paid.

Q. Just speaking about the number.

A. From the standpoint of the fuel oil which we hauled and the other chemicals, the heavier products, which were heavier than gasoline.

The Court: Can you make any reasonable estimate of the ratio of the number of times in which you had to pay fines as against the total number of actual violations?

The Witness: I would say a reasonable estimate would be 50 per cent of the loads which we moved would have been overloaded.

Mr. Sarner: That is not quite a response. I think you say 50 per cent of the number of loads were overweight.

The Court: Of those 50 per cent that were overweight, what portion of that resulted in fines?

The Witness: Well, a very minor portion. The fines which we paid in Pennsylvania totaled approximately 215 fines in 1951.

The Court: Can you make any estimate then as to the percentage of the fines as against the actual number of violations?

(78) The Witness: Well, the trips in Pennsylvania which we moved on our own equipment. It would have been about half a per cent.

The Court: In other words, for every two hundred violations you paid roughly one fine?

The Witness: That is right.

By Mr. Sarner:

Q. Now in speaking of violations as you were just speaking, Mr. Sechrist, were you referring to the maximum gross weight of 45,000 pounds plus the five per cent leeway, or did you have in mind some other aspect of the weight law?

A. I was speaking of the gross weight.

Q. Your fines which were imposed on the vehicles which were stopped in 1951, did they relate to the maximum gross weight or other violations of the weight laws?

A. They were related to the maximum gross weight.

Q. Turning to the other states which you have mentioned—such as New Jersey, Delaware, West Virginia, Virginia, and whatever ones you mentioned—do you know

approximately on how many trips in those states your vehicles were overweight?

A. We had four overweight violations in New Jersey, we had three in Virginia, and one in Ohio.

Q. Those were the number of fines, as I understand it, which your company paid?

A. That is right.

(79) Q. Do you know whether or not your vehicles were overweight on trips in those states during 1951 for which your company was not fined?

A. I know of no instances in which they were overweight and that we were not fined.

Q. So that to your knowledge, if I understand you correctly, these were the only times that there were any violations?

A. That is right.

Q. Is that true for New Jersey as well as the other states?

A. Yes, it is.

The Court: Would you explain how all of the violations in the other states resulted in fines, whereas only one out of two hundred resulted in fines in Pennsylvania? Was there stricter enforcement in the other states?

The Witness: Not necessarily. In the other states the maximum gross weight would run approximately 60,000 pounds. Whenever we could buy the equipment, of course we bought for those states that we traversed. Those states of course had this larger weight law and the equipment which we operated in those states was equipment which was behind for that weight.

The Court: I understand that. What I do not understand is why only one-half of one per cent of the violations resulted in effective law enforcement in Pennsylvania, whereas 100 per cent of the violations

resulted in effective law (80) enforcement in the other states.

The Witness: We didn't operate illegally in the other states. For example, let me clarify——

Mr. Sarner: May I state something; if I may, Your Honor, not as testimony but in clarification of that. I think that what has been testified to will show that insofar as these other states were concerned there were no violations, except a possible inadvertent violation where there might have been a temperature change or a combination of a truck tractor and trailer——

The Court: Even so, my question is how was it that the authorities in the other states were so on the alert that they caught up with every one of them, whereas in the State of Pennsylvania——

Mr. Sarner: There were no more violations in these states than the two or three that were mentioned. Their equipment was so designed that they would be within the permissible 60,000 pounds maximum gross weight. There were no violations there except a possible violation which was occasioned through no fault of the carrier.

The Court: That is not responsive to my question. I do not think it is the function of counsel to answer; the burden is on the witness. My question is addressed to the witness. Whether the violations in the other states are frequent or infrequent or advertent or inadvertent, my question expresses (81) some surprise that the enforcement authorities in the other states were so much on the alert that they were able to pick up every one of them, few as they were, whereas in Pennsylvania only one-half of one per cent of them were picked up. I would like some comment on that from the witness.

The Witness: Well, the only comment that I can make is that we were very much more aware of the loads going into, for example, New Jersey, Maryland, Virginia, and West Virginia because their fine structure is a little different. You subject yourself to a much heavier fine.

The Court: That explains to me why you complied with the law more often in those other states, but it does not explain why in those instances in which you did not comply the state enforcement authorities were able to catch up with you on every such occasion.

The Witness: Well, now, let me explain the New Jersey situation. We thought we were legal when we went into New Jersey. What had happened, they had switched a tractor which bore a Pennsylvania tag and should have had a New Jersey tag in order to be legal in New Jersey. In other words, we had a New Jersey trailer and we had a Pennsylvania tractor. It was an interstate movement so there was no objection to it. But the minute we got in New Jersey, because we had the Pennsylvania tag on the tractor made it subject to Pennsylvania law. It was legal under the New Jersey law but was illegal under the Pennsylvania law, and therefore (82) it was subject to a fine.

By Mr. Sarner:

Q. Getting back to the earlier question, Mr. Seibrist, insofar as the states other than Pennsylvania were concerned, do you know whether or not your company operated equipment which was overloaded under the laws of those states on more occasions than on those on which you were fined—the states other than Pennsylvania or New Jersey?

A. I know of no occasions.

Q. Would there be any reason for the company to operate overloaded equipment in those states?

A. No reason.

Q. Do you know, Mr. Seckrist, whether this use of overloaded equipment in Pennsylvania in 1951 by your company was just confined to your company as a prevalent practice in the industry?

A. It was a prevalent practice in the industry, as I have said; and they have always published the fact that there are a considerable number of fines in Pennsylvania, overweight fines.

Q. What were your company's reasons for consciously operating the overloaded equipment in Pennsylvania in 1951?

A. During the war period, the standard tank seemed to be 4500 gallons. Now I was not with the company during the war period, although I did sit in on the board of directors' meetings from the time I started with the company, and this feature (83) was discussed at those meetings by the officials of the company. The 4500 gallon tank then became more or less the basis for determining a rate structure and setting up rates. The minute that we would give any thought to going into smaller equipment we became involved then with a reduced operating income with static cost.

Q. How did this reduced operating income affect your competitive position?

A. As long as the other operators were operating illegally we were at a disadvantage. They would show considerably more profit.

Q. Well, was any consideration given, to your knowledge, by the industry as a whole to increase the rates so that all the carriers in the industry could operate with smaller pay loads?

A. Yes, we discussed at our meetings as to the advisability of increasing rates.

Q. What was the conclusion reached?

A. Due to competition of the oil companies in the actual delivering of their own product and with the rails, we were unable to increase the rates and maintain the business.

Q. Were any conclusions reached with respect to the acquisition of smaller equipment in 1951?

A. Yes, we attempted to determine from the records whether it would be feasible to buy this smaller equipment. We were also faced with the inevitable decision that if we did that we (84) were not going to make enough operating income to offset the operating expenses.

Q. Did the role of the industry as a whole in relation to your company play any part in that decision?

A. Yes, as long as our competition maintained their same practice. It had been going on for the past number of years, and we had to continue.

Q. Did your interstate operations or your operations outside of Pennsylvania play any important part in your decision as to the size of equipment you had to have?

A. Definitely. Where we found out that in the surrounding states we could haul illegal loads with, say, a tandem axle trailer which hauled 5600 gallons, then we of course looked to that type of equipment since we were able to use it in the various states such as Ohio, West Virginia, Maryland, Delaware, and New Jersey. We tried to establish our identity on that equipment so when we moved around in those states we were legal. The only state in which we were illegal was Pennsylvania.

Q. Could you have purchased equipment which would have been legal in Pennsylvania and still have been usable in the other states?

A. Oh, it could have been purchased but it would have been very, very uneconomical and we would not have been able to stay in business at all if we had purchased equipment that was legal in Pennsylvania and then try to use it in another state.

(85) Q. Why could you not stay in business by doing that?

A. Well, the income would not be there, and then we are trying to compete with carriers in those other states that are hauling, for example, a 5600 gallon load; whereas

if we were hauling gasoline, we would be hauling a 1500 gallon load.

Q. Did you consider in 1951 the acquisition of permits to operate overloaded equipment in Pennsylvania?

A. There was talk of securing permits.

Q. What was the conclusion reached?

A. It just was not feasible to secure a permit which may take two or three days. The delay just would not warrant waiting for it. Most of our for-hire business, as it is called, they wanted the product possibly yesterday, but that makes it imperative that you are able to move immediately in the for-hire carrier business.

Q. In your consideration of the possibility of acquiring permits, did you consider the practice of the industry as a whole with respect to that matter?

A. Yes. No other industry did it.

Q. Would you have been able to do so? In light of what was done in the rest of the industry, would you have been able to secure permits?

A. No, we would have been delayed in trying to move the load.

Q. What effect would that have had on your business?

(86) A. We would have lost the business.

Q. Now turning to your relations with Tank Truck Rentals, Inc., in 1951, would you say they were or were not in competition with you?

A. They were definitely in competition with us. From the standpoint that when they failed to render the service at a price or at a return in revenue to us that would take care of our fixed expenses, then it no longer became feasible for us to use their service.

Q. Did your company discuss in 1951 or prior thereto, if you know, with Tank Truck Rentals, Inc., any proposal to increase rentals to compensate them for the increased cost of operating legal limit loads in Pennsylvania?

A. Yes, we discussed that with them. We decided that we could not give them any increase in rates, that the

amount which they were getting at that time was sufficient to take care of the business which they were doing, and if it went any higher, we would get equipment or get leased carriers elsewhere to do business.

Q. Do I understand, then, that it was the company policy that if an increased rate were required or demanded by Tank Truck Rentals, Inc., you would have made arrangements to lease similar equipment elsewhere?

A. That is right.

Q. What sanctions, Mr. Sechrist, were imposed on your (87) company by Pennsylvania in 1951 or prior years in Pennsylvania for operating the overloaded equipment?

A. The only sanction that was imposed upon us was the payment of the fine.

Q. No other sanction?

A. No other sanction. In fact, in most all of the cases we were notified several days later that there was an overload, and the fine could be paid then; it was not required to be paid on the spot.

Q. In Pennsylvania in 1951, do you know whether any of your overloaded vehicles were required by the Pennsylvania authorities to be unloaded in order to remove the excess weight before it could continue?

A. No, sir, none were required to be unloaded.

Q. With respect to the other states, do you know whether any were required to be unloaded?

A. There were none required to be unloaded since I have been with the company.

Q. With your company?

A. That is right.

Q. Do you know of any other sanction other than fines which were imposed on your drivers in 1951 for operating overloaded equipment?

A. No sanction imposed on them.

Q. Did you have any agreement in 1951 for 1951 Tank (88) Truck Rentals, Inc., with respect to the payment of

these fines which were imposed on the operation of their equipment?

A. They were responsible for all fines for overloading.

Q. Did you have any understanding or agreement with Tank Truck Rentals, Inc., that this matter was to be reimbursed to them in any part?

A. None whatsoever.

Q. Who paid the fines imposed in Pennsylvania for operating your own equipment in excess of the maximum weight limitations?

A. We paid the fines.

Q. Was the fine imposed literally on your company?

A. No, the fine was imposed upon the driver.

Q. May I ask why you paid the fine?

A. We have union contracts, similar to the contracts to which Mr. Kahley testified, with the Teamsters Union and in that contract they state that all fines for overloading are to be paid by the company.

Mr. Sarner: No further questions.

Cross-Examination.

By Mr. Armstrong:

Q. You said that the bulk of your heavy fuel oils, the bulk of those loads was carried by leased trucks, is that right?

A. That is right.

Q. That meant that the bulk of the load that you carried (89) was gasoline, is that right?

A. Gasoline, fuel oil.

Q. Then you had some?

A. We had some.

Q. Would you say about 75 or 80 per cent would be gas? Is that a fair estimate?

A. Oh, I imagine it would be closer to 60 or 65 per cent of them.

Q. Would be gas?

A. That is right.

Q. And the 35 per cent would be heavy fuel oil, would it?

A. No. We haul chemicals and coal tar products.

The Court: How do they compare in weight with gasoline?

The Witness: Well, your chemicals will vary in weight from a little less than six pounds to as high as fourteen pounds to the gallon.

By Mr. Armstrong:

Q. And there is no way of breaking that down to tell us in that 35 per cent how much is a light load as compared to the heavier materials?

A. Offhand I have no way of breaking that down, no.

Q. Now in the chemicals, that is special equipment which is a little different than the others?

The Court: Are those dry or liquid loads?

(90) The Witness: Those are liquid chemicals.

By Mr. Armstrong:

Q. Why did you lease vehicles to carry your heavy fuel oils?

A. The only reason that I know for us leasing for the heavy fuels is the requirement of a lot of equipment at one time to make the movement.

Q. Could you not have leased vehicles to move the gasoline just as well?

A. We could, but that is more of a steady movement throughout the year.

Q. Was it not because of this being subject to fines that caused you to lease vehicles to carry the heavy materials?

A. Not all together. That was not the controlling factor.

Q. It was a factor in it?

A. Yes.

Q. Now did you lease vehicles from other companies other than the Petitioner?

A. Yes, we leased from others.

Q. Did you pay the fines, if there were any, for the drivers of the other companies?

A. No, we didn't. The only fines which we paid were for our own drivers of our own equipment.

Q. On the loads of your fuel oils which were in excess of the maximum limitations in Pennsylvania, were they always done (91) consciously? Was your overloading conscious or was it inadvertent or what?

A. It was a conscious overloading. We hauled a full load of 4500 gallon.

Q. Did your tanks have compartments in them as Mr. Kahley testified to here today?

A. Some of the trucks were compartmented and others were a single compartment.

Q. So you could have loaded the trucks which had compartments in them and complied with the regulations?

A. They could have been loaded but we would not have been able to stay in business on the basis of loading only two compartments of the three compartments.

Q. You mean that particular load would have been uneconomical?

A. Oh, definitely. We would have been cutting off a third of the revenue.

Q. Now you said the Petitioner was in competition with your organization.

A. That is right.

Q. Actually the Petitioner could not haul on his own account because he did not have an Interstate Commerce Commission right?

A. He had to haul on our rights.

Q. He had to haul on somebody else's rights in every (92) instance?

A. That is right.

Q. He was not really a competitor?

A. He was a competitor from the standpoint from the amount we were charged.

Q. Now explain that.

A. If he tried to get the basis of the payment on the percentage of the revenue. Now if he wanted too much of that percentage of revenue, then we would go to some other based operator that we use and get them to do this business.

Q. Was the pay scale based on what the commodity was? In other words, did the pay scale depend on what the revenue was?

A. The revenue determined the pay.

Q. On a haul of gasoline did you pay more for the Petitioner's vehicles to haul your gasoline than you did for him to haul fuel oil per gallon?

A. It depended on what revenue was derived from that. It would be more or less.

Q. In other words, the payments you made to the Petitioner were a percentage of the revenue that you obtained from the load?

A. That is right.

Q. Did you get more from gasoline or from fuel oil?

A. Well, it just depends. There were some cases where the movement gave us less revenue and other cases where it gave us more revenue, depending on the rate structure.

(93) Q. You man more revenue per gallon?

A. That is right.

Q. Well, that depended on the distance, didn't it?

A. Well, the distance and the rate structure. We operate the same as all other common carriers in competition with the for-hire carriers. Their rates are set up on a basis of what competition is. Now one place you might haul for the same distance and get less money and another because of depressed rate condition.

Q. Do you know approximately how many common carriers there were in Pennsylvania in 1951?

A. Of all types of common carriers, I don't know.

Mr. Armstrong: I have no further questions.

Mr. Sarner: One further question.

RE-DIRECT EXAMINATION.

By Mr. Sarner:

Q. In answering Mr. Armstrong about filling a tank partially, one with compartments, did your company consider the possibility of partially loading one of your tank semi trailers?

A. Yes, we have considered it but it was too much of a hazard as far as the surge on the product. When the truck would stop all the product would have that much space to go forward in the tank and would tend—even though the tractor had stopped momentarily, this surge of the product going forward would push the entire unit ahead.

(94) Q. So that from a safety factor, and you said a competitive factor——

A. Yes. It also had a tendency to put a great deal of strain on the metal with that surging back and forth. It could be possible in liquids such as those, which are considered dangerous commodities to handle, that it is a bad safety factor.

Mr. Sarner: Nothing further.

RE-CROSS-EXAMINATION.

By Mr. Armstrong:

Q. That would not be true if you were using compartmented tanks; in other words, if you filled two compartments?

A. If there were two compartments and those compartments were full, it would not be in there, that is right.

Mr. Armstrong: No further questions.

(Witness excused.)

The Court: There will be a short recess.

(Whereupon, a short recess was taken.)

Mr. Sarner: Mr. Nimess, please.

Whereupon,

S. F. NINESS was called as a witness on behalf of the Petitioner and, having been first duly sworn, testified as follows:

The Clerk: State your name and address for the record.

The Witness: S. F. Ninness; 520 East Lancaster Avenue, Downingtown, Pennsylvania.

(26) DIRECT EXAMINATION.

By Mr. Sarner:

Q. Mr. Ninness, what is your occupation, please?

A. I am president of the Leeman Transportation Company, Leeman Transportation Corporation, and Chemical Transportation.

Q. That is what type of business?

A. Transportation of liquids.

Q. Do you do inter- or intrastate business, or both?

A. Both.

Q. In what states do you principally operate?

A. Principally New York, Pennsylvania, New Jersey, Delaware, Maryland, West Virginia, and Ohio, and into about eighteen other states.

Q. Mr. Ninness, have you had any governmental service?

A. Yes, sir.

Q. Will you tell us what that has been?

A. In 1941 I went to Washington with Mr. Ickes, Department of the Interior, to make a survey of the tank trucks on the eastern seaboard. In 1942 I went to Washington as chief of the Petroleum Section of O. D. T. Later I became director of that division.

Q. As director of this Petroleum Section of O. D. T., what were your duties and responsibilities?

A. It was our function to put as many loads of petroleum products and liquid products onto tank trucks, to tankers, to (26) move petroleum from the Southwest and

later on from the end of the Big Inch Pipe Line, Illinois, to to the eastern seaboard.

Q. How long were you connected with that governmental service?

A. To the duration of the war.

Q. In your capacity as director did you have any responsibility with respect to the manufacture of tank trucks during the war years?

A. Not the manufacture, but the War Production Board assigned to us the task of allocating first all the new tanks, all the new trucks, tractors, that had been built and frozen by the Government at the beginning of the war. We allocated those tractors out as we saw fit. We also advised the War Production Board—Mr. Nelson was in this group as to the size of the tank trailers that should be built during the war which should be uniform throughout the country and which would save steel and rubber.

Q. And what were your recommendations with respect to that matter?

A. We recommended that we would build, should build, tanks of 4,500 gallons to 5,000 gallon capacity which would take in the majority of the country, and also single compartment units to save steel.

Q. Were multiple compartment units manufactured during the war years?

(97) A. No, sir.

Q. With respect to the operations of your company, Mr. Nimess, would you say that your own company operates substantially the same or differently from those similarly situated in the industry?

A. The same.

Q. Are you familiar with Coastal Tank Lines and Matlack, Inc.?

A. I am.

Q. What type of business are these companies engaged in?

A. Transportation of liquids.

Q. Now in the states which you have mentioned in which your company operates, who would you say are the companies which do the largest amount or volume of business in those states in this transportation of bulk liquids?

A. As far as New York, Pennsylvania, Delaware, Maryland, and West Virginia, I would say that Leeman Transportation Company, Matlack, Inc., and Coastal Tank Lines, in that order, do the largest of any companies in the country.

Q. You are familiar with the type of equipment which your company had in 1951?

A. Yes, sir.

Q. And you are familiar with the equipment which was used and operated generally in the industry in that year?

A. Yes, sir.

(98) Q. What was the capacity of the tank which was used industry-wide in that particular year?

A. From 4,000 to 5,000 gallons; the 4,000 being bought prior to the war. During the war all you could buy were the four to five thousand gallon capacity. After the war of course the manufacturers still made and operators bought the larger sized tanks.

Q. In 1951, Mr. Niness if you know, were any semi-trailer tanks engineered of a lighter metal than iron or steel?

A. No, sir.

Q. Did your company conform to the industry practices with respect to the operation of equipment in Pennsylvania in 1951?

A. You mean that load the tanks to capacity?

Q. Yes.

A. Yes, we did.

Q. And on all types of fuel which your company carried?

A. Yes. We used our smaller tanks where we could and the heavier products, but we load those tanks to capacity.

Q. Did you consider the possibility of acquiring smaller tanks in 1951 in order to conform to the weight limitations of the Pennsylvania statute?

A. Yes, we did; and we acquired some in 1951.

The Court: What was the size of the smaller tank?

The Witness: Four thousand gallons.

By Mr. Sarner:

Q. With respect to the bulk of the fleet, what was the (99) size of the tanks?

A. Forty-five hundred to five thousand.

Q. Was it true with your company, as was testified to by the other two witnesses, that the equipment had to be available for use in the various states?

A. Yes, sir. You have to operate in all surrounding states at the call of the oil companies because they change their point of origin from day to day, and we have to follow the product around.

Q. Would you say it was a widespread industry practice to operate overloaded equipment in Pennsylvania in 1951?

A. Yes, sir.

Q. Was the equipment which was in general use in the industry in 1951 suitable for Pennsylvania as such?

A. Not legally.

The Court: That would depend on the load, would it not?

The Witness: Yes, sir. If you carried gasoline, it would be legal. If you carried 4,000 gallons of No. 2 or No. 4 or No. 5 fuel oil, you would be legal. You might be a little over on a size of your tractor with a 4,000 Bunker C or No. 6 oil. It depends on specific gravity of the oil and the heat of the oil.

By Mr. Sarner:

Q. Did you consider the possibility of not loading the (100) tanks to capacity and operating in Pennsylvania?

A. We did. Many times we cut it down to stop the fines because we didn't want to be illegal, didn't want to be held as an illegal company. But then competition crept in and you had to get back in it again.

Q. Was there any safety factor?

A. It is not safe to operate a tank partially filled.

The Court: Is that a substantial hazard or one that you do not take too seriously?

The Witness: It is serious enough, sir, because there is a surge; you can't get away from it. Another factor is that when you go around on a turn liquid tends to go to the far side of the truck.

By Mr. Sarner:

Q. Centrifugal force?

A. Yes. You can overturn the truck if you go around a turn too fast with a partially loaded truck.

Q. Did your company consider the possibility of acquiring permits for operating equipment in Pennsylvania?

A. Yes, sir.

Q. What were the conclusions reached?

A. It was not worth it because, number one, they do not want to issue them. They don't issue for continuous loads; they only issue them for special heavy occasional loads.

Q. In addition to the fact that it would have been difficult (101) to obtain permits, were there any other considerations?

A. There was a cost factor, but the other factors would not let you get into the cost factor because the state did not want you to do it and that was it.

Q. Do you know whether the industry as a whole sought out permits?

A. Not the industry, because over the road dry cargo or wet cargo the industry has heavy duty machinery.

Q. I am talking about bulk liquid carried.

A. No, sir.

Q. They did not?

A. No, sir.

Q. Did you discuss in 1951 with Tank Truck Rentals any possibility of increasing their percentage revenue for operating a lesser pay level?

A. Yes. It was discussed, but that is as far as it got because we just could not do it.

Q. Did the industry as a whole, to your knowledge, discuss the possibility of seeking an increase in the rates to compensate for operating at a reduced pay level?

A. Yes, that was discussed, but you cannot do it because if you did the consignees would put their own trucks on or use rail because the rates are practically the same.

Q. What sanctions, if any, Mr. Niness, were imposed on your company with respect to the operation of overloaded equipment (102) in 1951 in Pennsylvania?

A. What do you mean by "sanctions"?

Q. Fines or anything else which the company incurred.

A. Oh, yes, we were fined in 1951. That is why we started to buy smaller equipment.

Q. Do you know whether in 1951 any of your drivers were forced to remove the excess load in Pennsylvania?

A. No, sir.

Q. You do know?

A. I do not know of any case ever requested to take off the excess load.

Q. Is that true in Pennsylvania only, or is that true in other states?

A. Well, we never had an experience that I know of of taking a load off in Pennsylvania in the history of our company. We have removed a load in Virginia at one time which was loaded by mistake and we had to take the load off.

Q. Insofar as the industry practice is concerned, Mr. Niness, would you say that the operation of overloaded equipment was prevalent in states other than Pennsylvania?

Mr. Armstrong: I object to that as a leading question, Your Honor. Counsel has been leading the wit-

ness all day. I think it is up to the witness to testify and not for the counsel to lead.

Mr. Sarner: Well, I am just asking——

(103) The Court: That question may be answered.

The Witness: I would say no because of the fact that the states surrounding Pennsylvania all have 60,000 pounds gross weight and it was not necessary to overload. In fact, the tanks would not hold enough to overload, at least the tanks we had.

By Mr. Sarner:

Q. Mr. Niness, in connection with the fines which were imposed, who paid those fines?

A. The company.

Q. Can you tell us the reason why the company paid those fines?

A. Well, we are not organized by any of the bigger unions. We have our own association, but we have always paid our overweight fines because that is not a part of the driver's responsibility. If the loader overloads the truck or if we overload the truck, that is our business, not his.

Mr. Sarner: No further questions.

Cross-Examination.

By Mr. Armstrong:

Q. You say 4,000 gallon trucks were available in 1951?

A. Yes, you could purchase them.

Q. And you had some in your organization?

A. We had some from before the war, and we bought some in 1951, yes, sir.

Q. Do you have any idea how many you had in 1951?

(104) A. A very small percentage because they don't last too long. As you know, they don't last forever and I would say that——

Q. Comparatively speaking, to the rest of your fleet.

A. I would say 10 per cent of our fleet was 4,000 gallon, probably.

Q. You mentioned No. 2, No. 4, and No. 5 oils.

A. They are fuel oils, yes.

Q. They were lighter or heavier?

A. They are heavier than gasoline but lighter than Bunker C or No. 6.

Q. Would they be under seven pounds per gallon?

A. No, sir. They start at 6.8 and go up to eight pounds per gallon.

Q. Did you lease any vehicles in your operations?

A. Some, not many. We didn't at that time lease too extensively. We leased for Tank Truck Rentals.

Q. In 1951?

A. Yes, sir.

Mr. Armstrong: I have no further questions.

Mr. Sarner: One further question.

RE-DIRECT EXAMINATION.

By Mr. Sarner:

Q. Did you have any understanding or agreement with Tank Truck Rentals with respect to the payment of fines which were (105) imposed on Tank Truck Rentals for operating the overloaded vehicles?

A. No.

Q. Whose responsibility was that?

A. That was theirs.

Q. Did they have any agreement to reimburse them?

A. No, sir.

Mr. Sarner: No further questions.

(Witness excused.)

Mr. Sarner: Mr. Zook, please.

Whereupon,

C. W. ZOOK was called as a witness on behalf of the Petitioner, and having been first duly sworn testified as follows:

The Clerk: State your name and address for the record.

The Witness: C. W. Zook; Thirty-third and Arch Streets, Philadelphia 4, Pennsylvania.

DIRECT EXAMINATION.

By Mr. Sarver:

Q. What is your occupation, Mr. Zook?

A. I am Traffic Manager for E. Brooke Matlack, Inc.

Q. In what business is E. Brooke Matlack, Inc., engaged?

A. In the transportation of liquids.

Q. By——?

A. Tank trucks.

(106) Q. How long have you been engaged in this type of business?

A. Since 1936, and with this company since 1942.

Q. In what capacity were you employed in 1951?

A. Traffic Manager.

Q. What was the nature and extent of your duties and responsibilities as such officer?

A. I was in charge of the transportation.

Q. You are familiar with the types of equipment which your company owned and operated in 1951?

A. Yes, I am.

Q. Was that similar or dissimilar to the equipment used and operated generally in the industry in that year?

A. It was similar.

Q. What type of equipment is that?

A. It consists of a tractor and semi-trailer tank.

Q. Were the capacities of your tanks similar or dissimilar to that which was generally in use in that year?

A. Similar, yes.

Q. What were the capacities?

A. They varied from four to five thousand gallons.

Q. Did your practices with your company conform to the practices which were prevalent in the industry with respect to the operation of overloaded equipment in 1951?

A. I think so.

The Court: In other words, you loaded your equipment (107) to full capacity?

The Witness: Yes, sir.

The Court: Your equipment loaded to full capacity resulted in overweight, depending upon what the cargo was?

The Witness: That is true; yes, sir.

By Mr. Sarner:

Q. Was this true, Mr. Zook, for purposes of your company with states other than Pennsylvania?

A. With respect to loading them full?

Q. And with respect to being overweight.

A. Well, in the other states when the tanks were loaded full they were not overweight.

Q. Then do I understand you correctly that therefore your overloading was restricted to Pennsylvania?

A. Yes.

The Court: Would that not also depend upon the nature of the load or cargo?

The Witness: Not in the other states, sir. Not to my knowledge, anyway.

By Mr. Sarner:

Q. Why is that, Mr. Zook?

A. Well, the 5,000 gallon tanks when they were loaded to capacity would not exceed the 60,000 pound gross in the other states.

Q. That would be true even for your Bunker C which we might say weighs eight pounds a gallon?

(1081) A. It didn't usually move in that quantity. It usually moved in 4500 gallon quantities.

Q. Did your company consider the possibility of acquiring smaller tanks and equipment in 1951?

A. Yes.

Q. What was the conclusion reached with respect to that?

A. A small number of them were purchased.

Q. Would it have been possible to purchase more than a small number?

A. Well, to convert the whole fleet it would have been possible, yes, sir, but that was not practical.

Q. Well was it practical, Mr. Zook, to have equipment, say, of 4,000 gallons for use in your operation?

A. Well, we didn't consider it practical, no, sir. But we did it in order to try to comply.

Q. Did your interstate operations play any part in your decisions as to what type of equipment you could use and operate in 1951?

A. Yes.

Q. What was that?

A. Most of our equipment—in fact, all of our equipment was purchased so it could be interchanged between the states. The only state that we were in any trouble was Pennsylvania. All the other states allowed us approximately 60,000 pounds.

Q. Could you have purchased equipment solely for use in 1951 Pennsylvania?

A. No, that is not very practical, either because the equipment has to be interchanged. A good portion of our work is into the states that surround Pennsylvania, and it is not practical to use the smaller type tank.

Q. Was the experience of your company in 1951 substantially the same as that testified to by these other companies with respect to the payment of fines for operating overloaded equipment?

A. Yes, it is.

Q. By that, would you say that the fines imposed on your company in Pennsylvania were greater or lesser in number amount than imposed in other states?

A. Greater.

Q. Would you say substantially or not substantially?

A. Very substantially greater.

Q. Did your company consider the possibility of acquiring permits to operate overloaded equipment in Pennsylvania in 1951?

A. Yes, we did.

Q. What was the conclusion reached?

A. That is not a very practical way to operate, either. First of all, the permits are discretionary so far as Pennsylvania is concerned, and I am sure it was not the intent to continue to issue permits for the same piece of equipment day in and day out.

Q. Do you know whether the industry as a whole sought permits on bulk liquid loads which the industry carried out to Pennsylvania authorities?

A. No, they didn't get them, sir. Whether they sought them, I don't know.

Q. Did your company have any experience with that?

A. We got one permit, but that was not to haul a load of liquid; it was for another commodity.

Q. Did you have any business dealings with Tank Truck Rentals in 1951?

A. Yes, we did.

Q. And by that will you explain what arrangements you had with them?

A. We had a lease arrangement with them whereon they took care of our peak loads during certain times of the year 1951.

Q. Did you have any agreement with them with respect to the responsibility for the payment of fines which might be imposed on the operation of any of Tank Truck Rentals' fine's leased equipment?

A. There was no specific agreement, no, sir.

Q. Whose responsibility was that?

A. Theirs.

Q. Do you have any arrangement to reimburse them for any of these sums?

A. No, sir.

(111) Q. With respect to the fines which your company may have paid in 1951 to the State of Pennsylvania for operating overloaded equipment, were those fines imposed directly on the company?

A. No, they were imposed upon the drivers.

Q. Why did the company undertake to pay them?

A. In at least one of our contracts with our men that is specifically covered in the contract, and then it follows all the rest of the men should be similarly treated.

Q. In the experience of your company in 1951, were any sanctions other than fines imposed for operating the overloaded vehicles in Pennsylvania?

A. No, sir, not in Pennsylvania.

Q. Do you know with your experience in any of the other states in your company?

A. Not if I——

Q. Let me make that a little more specific. Do you know whether any vehicles of your company were required to be unloaded in any of the other states because of excess weights?

A. I know of one such occasion, and that was a mistake. We did have to partially unload.

Q. That was not in Pennsylvania?

A. That was in Maryland.

Q. Do you know of any sanctions other than fines which were imposed on the drivers for operating the overloaded equipment, (112) such as arrest or imprisonment or suspension of operator's license?

A. There were none.

Mr. Sarner: No further questions.

CROSS-EXAMINATION.

By Mr. Armstrong:

Q. What did you have Tank Truck Rentals, Inc., haul for you, Mr. Zook, heavy liquids or light liquids, or both?

A. Both.

Q. Did I understand you to say in the 5,000 gallon trucks you normally carried 4500 gallons?

A. I misunderstood you, sir.

Q. In your testimony a little while ago did I understand you to say in the 5,000 gallon tanks that you would normally carry 4500 gallons of pure oil?

A. Well if I said that, I certainly didn't mean it.

Q. That is not the fact?

A. That is not the fact, no, sir.

Q. Did you say you had some 4,000 gallon tanks?

A. Yes, sir.

Q. Approximately how many did you have compared to your other trucks?

A. It was a very small number, sir. I don't know if it would reach 10 per cent or not; I doubt it.

Q. Perhaps less than 10 per cent?

(113) A. Perhaps, probably.

Q. Probably.

Mr. Armstrong: I have no further questions.

Mr. Sarner: No further questions.

(Witness excused.)

Mr. Sarner: Mr. Krathen, please.

Whereupon,

MORRIS KRATHEN was called as a witness on behalf of the Petitioner and, having been first duly sworn, testified as follows:

The Clerk: State your name and address, please.

The Witness: Morris Krathen; 1231 June Road, Huntington Valley, Pennsylvania.

DIRECT EXAMINATION

By Mr. Sarner:

Q. What is your occupation, Mr. Krathen?

A. I am a C. P. A.

Q. How long have you been engaged in the practice of accounting?

A. Approximately fifteen years.

Q. How long have you been a certified public accountant?

A. Approximately five years.

Q. What is your formal education?

A. I attended Temple University and the University of Pennsylvania.

(114) Q. Are you a member of any professional societies?

A. Pennsylvania Institute of C. P. A.'s.

Q. Do you specialize in any particular field of accounting?

A. I do, in motor transportation work.

Q. How long have you practiced this specialty?

A. Approximately ten years.

Q. Do your know approximately how many motor truck carriers are your clients?

A. I would say about fourteen.

Q. Do you know, Mr. Krathen, whether or not your reports are required to be filed by those carriers periodically with the Interstate Commerce Commission or with the state public utility commissions in the various states?

A. Yes, they are.

Q. Have you or have you not prepared any of these reports for clients for the year 1951 or prior years?

A. I have.

Q. Do you know what the nature and purpose of the reports are?

A. These reports are prepared in compliance with requirements of both the public utility commissions of the various states and the Interstate Commerce Commission for reporting purposes to them and to be used for promulgation of rates.

Q. Mr. Krathen, are you familiar with the Uniform System (USA) of Accounts promulgated by the Interstate Commerce Commission for Class I common and contract motor carriers?

A. Yes, sir, I am.

Q. Do you know the purpose of this Uniform System of Accounts? Must do you know?

A. Standardized reporting information submitted by each of the carriers to the Interstate Commerce Commission.

Q. Now, Mr. Krathen, in your examination of the books and records of your motor carrier clients, did you or did you not find amounts paid by these carriers to the various states as fines for operating overweight vehicles?

A. Yes, sir, I did.

Q. Was payment of these fines included on any of the reports which you filed on behalf of the clients with the Interstate Commerce Commission or interstate regulatory bodies in 1951?

The Court: I wish to register an objection to this line of questioning as having no bearing on the issue here. What happened with respect to Interstate Commerce Commission reports which were used for the purpose of rate fixing seems to me to have no bearing upon the issues here in this case.

Mr. Sarner: If Your Honor please, we stipulated in our supplemental stipulation that the Pennsylvania Public Utility Commission adopts and uses the same accounting practices and interprets words and prescribes the Uniform System of Accounts (116) the same as the Interstate Commerce Commission. We think that if we can show that one public regulatory body of Pennsylvania, the State of Pennsylvania as well as the Interstate Commerce Commission treats these fines for overloaded vehicles as an operating expense in fixing rates and revenue for these carriers, that this is an indication that the public policy of the various states as not being of Pennsylvania is not to be frustrated by allowing this type of expense also to be treated as a legitimate ordinary and necessary business expense for tax purposes.

I think that is of importance to the court to appreciate that insofar as the realm of public policy is concerned, other bodies which are concerned with responsibilities in that field have treated these fines as legitimate. It is not controlling, but I think it should be before the court for the weight it has.

The Court: These questions have only to do with the reports that are filed, not with the rates that are determined upon the basis of these reports.

Mr. Sarner: Well, we will demonstrate that these reports are used for rate making purposes and the accounts——

The Court: They may be used in the sense they are considered, but just how much weight is given to each particular item in a report is something that I do not know we can go into. We cannot go into a rate hearing.

Mr. Sarner: We aren't, but I think it is relevant for (117) the court to understand and to know that under the public utility——

The Court: I will let you put it in. However, before I can give any substantial weight to it, I will have to have you show me on brief just how I have to consider on the face of it. It seems to me that you are getting pretty remote.

Mr. Sarner: All right. I will undertake that burden.

Mr. Armstrong: I don't know that this witness is going to be competent to testify as to what weight is given to this matter by the Interstate Commerce Commission.

The Court: He is being asked now what is in the reports. He prepared the reports, so I presume he can answer.

Mr. Sarner: Will you read the last question?

(The pending question was read by the reporter.)

The Witness: The lines were included as an operating expense in these various reports filed.

By Mr. Sarner:

Q. Was there any particular account number under the Uniform System of Accounts to which you placed these lines in the reports in 1951?

A. Yes, sir, in Account 4280.

Q. Mr. Krathen, I show you Exhibit 11 which has been marked for identification and ask if you can tell us what that is, please.

A. Yes, sir. This is the Uniform System of Accounts for (118) Class I common and contract motor carriers of property.

Q. Will you turn to Account 4280?

The Court: That is included in the supplemental stipulation, is it not?

Mr. Sarner: Yes, sir.

The Court: Paragraph 2 of the supplemental stipulation?

Mr. Sarner: That is right.

Will you mark this as Petitioner's Exhibit No. 12 for identification.

(Petitioner's Exhibit No. 12 marked for identification.)

By Mr. Sarner:

Q. Mr. Krathen, I show you Exhibit No. 12 which has been marked for identification and ask if you can identify this.

A. This is a form of an annual report submitted annually to the Interstate Commerce Commission by the various carriers.

Q. And for what year is that report?

A. For the year ended December 31, 1951.

Q. That is a blank report, is it not?

A. That is so.

Q. Where on that report would fines for operating overloaded vehicles be shown?

A. It would be shown in Account 4280.

Mr. Armstrong: I think that has been stipulated, Your (119) Honor.

Mr. Sarner: That particular item has been stipulated. I would like to offer these two exhibits, Exhibits 11 and 12, into evidence.

The Court: They are accumulative, but I will admit them.

(Petitioner's Exhibits Nos. 11 and 12 received in evidence.)

By Mr. Sarner:

Q. Do you know whether any examination and review was made by the employees of the Interstate Commerce Commission of the annual reports which you filed on behalf of your clients?

A. Yes, sir, they are reviewed in Washington and also by a field accountant by comparing with the original books and records of the companies.

Q. Was this the practice and procedure in 1951, if you know?

A. It was.

Q. Do you know whether any adjustments or changes are made either by the examining officer or by the reviewing authorities in Washington with respect to items which you show on your reports?

A. Yes, there are adjustments made. For instance, on those referred to by Washington there may be some statistical information which is either lacking or which bears some further (120) consideration, or upon a field examination certain items may be changed from one expense category to another, or capitalizing of some expense by the field agent.

Q. Now with respect to your treatment of fines for operating overloaded vehicles as a 4280 expense, to your knowledge was there any change made in 1951 or prior thereto with respect to your treating this as an Account 4280 item?

A. No, sir, there were no changes made to my knowledge.

Mr. Sarner: No further questions.

CROSS-EXAMINATION.

By Mr. Armstrong:

Q. Would you also know if changes were made in your reports by the examiners?

A. Generally so. Our clients are accustomed to turning over only matters pertaining to the accounting to our association or our group, and that would be included. Such as they would refer any changes in the books or records, that we would be in a position to determine whether those changes would be proper or not.

Q. You are assuming that the field examiner would notify the person who filed the report. You say that person would then notify you?

A. That is right.

Q. But in every case the field examiner would notenotify the person filing the report?

(121) A. Yes, sir, he would. He leaves a Form C which is a notice to the company of certain improper accounting violations or improper accounting practices that each company then has to change its method or manner of accounting to conform to that.

Q. Assuming that the Interstate Commerce Commission allows the item to stay in the reports in the place that you have just mentioned, you do not know what weight is given that matter or that particular item by the Interstate Commerce Commission, do you, in fixing its rates?

A. No, sir, I do not.

Q. That is considered by them, and how they evaluate it you know nothing about, is that true?

A. That is true.

The Court: If there were any fines for the use of faulty equipment, would such fines similarly come under 4280?

The Witness: They would.

The Court: For traffic violations, exceeding speed limits?

The Witness: Yes, sir, they would be included in Account 4280.

By Mr. Armstrong:

Q. Have you ever known of any instance in which the field examiner rejected your including or any of your clients including fines for overloading vehicles in 4280, the traffic violation section?

(122) A. No, sir. To my knowledge they have never been changed for that reason.

Mr. Armstrong: I have no further questions.

RE-DIRECT EXAMINATION.

By Mr. Sarner:

Q. Mr. Krathen, is there under the Uniform System of Accounts any distinction made between operating expenses on the one hand and other deductions on the other?

A. Yes, sir, there is.

Q. Now in answer to Judge Raum's question about operating faulty equipment, you indicated that that would be in Account 4280. I call your attention to Account 7500 and ask you whether you maintain the same answer to the Judge.

A. May I read this?

Q. The appropriate provision, yes.

A. Under Section 7500 it states: "Penalties and fines for violations of law except for violations of traffic regulations which are provided for in Account 4280 Other Transportation Expenses." I believe that I have testified that to my knowledge all those that have been charged in Account 4280. I am familiar with this provision in here. To my knowledge the companies have been charted to Account 4280 and they have remained there.

Q. You are talking about fines for faulty equipment?

A. That is right.

(123) Q. But Account No. 7500 is what type of account?

A. That is an account. It is another deduction which is not to be considered in arriving at net income from carrier operations. That is below the line Expense.

Mr. Sarner: No further questions.

Mr. Armstrong: No further questions.

(Witness excused.)

Mr. Sarner: I have one more witness, Your Honor. It will take no more than five minutes.

Mr. Kesel, please.

Whereupon,

FRANK J. KESEL was called as a witness on behalf of the Petitioner and, having been first duly sworn, testified as follows:

The Clerk: Please state your name and address.

The Witness: Frank J. Kesel; Radnor; Pennsylvania.

DIRECT EXAMINATION:

By Mr. Sarner:

Q. What was your occupation in 1951, Mr. Kesel?

A. Field accounting examiner for the Interstate Commerce Commission.

Q. What was the territory which was under your jurisdiction?

A. Pennsylvania, Maryland, District of Columbia, and Delaware.

(124) Q. How many field examiners similar to you were employed by the Interstate Commerce Commission in 1951?

A. I think there were about sixteen in 1951.

Q. What was the nature and extent of your duties as such field examiner?

A. Well our duties, of course, in connection with the new Class 1 carrier was to see that the accounting system was adopted and installed properly.

Q. And with respect to existing carrier?

A. Existing carrier. And I was to examine the annual report against the books of account to see that they agreed and that the items were distributed properly and reported in the annual report correctly.

Q. Now there is a distinction made under the Uniform System of Accounts between operating revenue and operating expenses on the one hand, and other income and other deductions on the other.

A. Well, operating revenue was revenue derived from transportation, and of course operating expenses for ex-

penses in connection with the operating of the vehicles and the transportation business. Now other operating expenses and other operating revenue may be from sources not having any relation to the transportation business.

Q. Did you say other operating revenue, or other revenue?

A. Other revenue.

(125) Q. Do you know why that distinction is made between operating revenue on the one hand, and other revenue and expenses on the other?

A. Because the items of non-operating expenses were not taken into consideration at rate hearings with the Commission.

Q. Now in the examination of the books and records of the Class I motor carriers within your jurisdiction, Mr. Kesel, in 1951 did you find any record of payments for fines for operating overloaded vehicles by those carriers?

A. Yes, sir.

Q. In what account did you place those fines?

A. We were not very much interested whether it was a fine in connection with an overloaded vehicle or for exceeding the speed limits, see, or for passing a red light. It was a payment to a Justice of the Peace.

Q. And in what account was that placed?

A. It was charged to Account 4280, Other Transportation Expenses.

Q. That is an operating expense, is it not?

A. That comes under Transportation Operation.

Q. Now had there been a fine paid for having faulty equipment, to what account would that be placed?

A. If it is a violation of the safety regulations which would come under the heading of faulty equipment such as brakes, see, which would be a fine assessed by a judge, see, that would (126) be charged to Account 7500.

Mr. Sarner: No further questions.

Cross-Examination.

By Mr. Armstrong:

Q. You say, Mr. Kosel, if the fine were assessed by a Judge, it would be in Account No. 7500?

A. Well there may be violations by a motor carrier, see, such as operating without authority; violation of the safety regulations; not assessing the property rates; rebates and things of that type, see. That is a regular case that comes before a United States District Court, see, and the motor carrier has an opportunity to plead guilty or not guilty; and it is a trial.

The Court: If there is a trial and there is a multiple charge—say there is a charge for going through a red light, a charge for speeding, and thirdly a charge for faulty brakes—and separate fines are imposed for each one of these three violations, would you put one of the fines under 4280 and the others under 7500?

The Witness: Pardon me, but the only trial would be a fine of a Federal Judge, would be a fine of the Interstate Commerce Commission.

The Court: I am not talking about a Federal Judge, I am talking about a state violation.

The Witness: The state cannot fine a motor carrier for safety, see. That is an Interstate Commerce Commission (427) regulation.

The Court: Is it your testimony that a truck that drives with faulty brakes cannot be subject to fine under state law for having faulty brakes?

The Witness: That we fellows have nothing to do with, but the Interstate Commerce Commission has the safety regulation that the motor carriers must comply with.

The Court: I am not talking about the Interstate Commerce Commission regulations, I am talking about

a violation of a state law by reason of having faulty brakes.

The Witness: That was all charged to Account 4280. That is a traffic violation.

The Court: And that violation that you are speaking of, that went under Account 7500 which are violations of regulations of the Interstate Commerce Commission itself?

The Witness: The Motor Carrier Act.

The Court: Yes.

The Witness: Not the Interstate Commerce Commission.

The Court: But as far as violations of state safety laws are concerned, penalties in that regard would be included under 4280?

The Witness: Account 4280.

By Mr. Armstrong:

Q. Do you have anything to do with rate hearing or rate fixing?

(128) A. No, sir.

Mr. Armstrong: No further questions.

Mr. Sarner: That is all, Your Honor. Thank you, Mr. Kosel.

(Witness excused.)

Mr. Sarner: That is the taxpayer's case, Your Honor.

(131) Mr. Armstrong: Mr. Forsyth, please. Whereupon,

ANDREW FORSYTH was called as a witness on behalf of the Respondent and, having been first duly sworn, testified as follows:

The Clerk: State your name and address, Mr. Witness:

The Witness: Andrew Forsyth, 2065 Maplewood Avenue, Abington, Pennsylvania.

DIRECT EXAMINATION.

By Mr. Armstrong:

Q. Mr. Forsyth, where are you employed?

A. At the present time I am employed in what is known as District 60 for the State of Pennsylvania.

Q. And where is that district located?

A. That is located at 449 Montgomery Avenue, Haverford, Pennsylvania.

Q. What is your position?

A. My position since the early part of 1951 has been District Permit Engineer for that district, which comprises Bucks, Delaware, Chester, Montgomery, and Philadelphia Counties.

Q. Prior to 1951, what was your position?

A. From the latter part of 1946 until the early part of 1951, (132) I was Acting District Permit Engineer.

Q. Prior to 1946 were you employed by the Highway Department?

A. I was.

Q. How long a time was that?

A. I have been employed since 1932.

Q. Now in 1951 what were your duties?

A. My duties were to check on all applications for special hauling permits and for what we call occupancy permits. Now we have quite a large number of hauling permits which would be for loads in excessive weight, width, height, or length.

Q. Would those permits be issued for hauling originating in this area, or just what is the situation?

A. We would issue permits for loads originating or stopping anywheres within this District 60.

Q. How about loads passing through?

A. For loads passing through, if we had a load starting in Philadelphia and going clean to the Pennsylvania Ohio line, we would give them a permit; or if a load starting at the Pennsylvania Ohio line come into any county in this district, we would give them a permit.

Q. It has been stipulated that in 1951 the statutory maximum gross weight allowed for truck-tractor and semi-trailer combinations on the Pennsylvania highways was 45,000 pounds. Do you know what the policy of the State of Pennsylvania was in 1951 (133) with respect to loaded vehicles whose gross weight exceeded this amount to use the highways?

A. Yes, I do.

Mr. Sarner: If Your Honor please, I do not think the witness is qualified to testify to the policy in Pennsylvania. He might testify to the policy with respect to District No. 60, but I don't——

Mr. Armstrong: May I qualify this?

By Mr. Armstrong:

Q. Mr. Forsyth, your rules and regulations that you were enforcing in this district were the same as in the other districts of the state?

A. To the best of my knowledge, they were.

Q. Were you enforcing the laws of Pennsylvania with respect to permits?

A. That is right.

Mr. Armstrong: Then, Your Honor, I believe this witness is competent to answer the question.

The Court: He may answer it.

The Witness: What was the question?

The Court: The Petitioner may later cross examine him to weaken the effect, but I think the witness may answer.

By Mr. Armstrong:

Q. I will repeat the question. What was the policy of the state in 1951?

(134) A. Well, the policy of the state is never to issue permits for any load for excessive weight where they can take off enough material to reduce that load to our gross weight of 45,000 pounds. Sometimes we have applications for permits which we call built-up loads on which they would want a permit for a load in excess of 45,000 pounds. We are not permitted to give permits if that load can be reduced to the legal limits of 45,000 pounds.

Q. Was that true in 1951?

A. Yes, sir, it was.

Q. And when you say "if the load could be reduced" — take, for example, a truck hauling gasoline. Would you say that that load could be reduced?

A. Yes. We would keep within the legal limits.

Q. Now were you here during the entire trial of this case yesterday?

A. I was.

Q. Did you hear the witnesses of the Petitioner testify?

A. Yes, I did.

Q. Would the witnesses of the Petitioner have been able to get a permit to haul loads of gasoline, fuel oil, and chemicals whose gross weight exceeded 45,000 pounds in 1951?

Mr. Sarner: I must object to that question. I think the only thing this witness can testify to is whether he would have issued a permit. This statute which is before Your Honor, I mean, specifies what the

permission is in Pennsylvania with (135) respect to issuing permits.

The Court: You may ask this witness what he did and what the practice of the office was in which he was employed and about which he has personal knowledge.

Mr. Armstrong: All right.

By Mr. Armstrong:

Q. Mr. Forsyth, would you have granted such a permit?

A. I would not.

Q. To your knowledge, was it the practice of the state to grant such a permit?

Mr. Sarner: Your Honor, as to——

Mr. Armstrong: Now he has testified as to what the policy of the state was, the policy of the state to grant permits in such instances.

Mr. Sarner: I think this court has limited the questioning to what the practice of Mr. Forsyth's office was.

The Court: I think you better put the question to him in terms of what his office did in the matter that was within his own personal knowledge.

By Mr. Armstrong:

Q. Your office was bound by the laws of the State of Pennsylvania and you were operating under the laws of the State of Pennsylvania, is that right?

A. That is right.

Q. Was it the practice of your office to grant permits in 1951 (136) to allow vehicles whose gross weight exceeded 45,000 pounds to use the highways?

A. No, not for the type of loads discussed yesterday.

Q. That is what I mean. Now would you explain, Mr. Forsyth, what special hauling permits or for what purpose special hauling permits were granted?

A. Well, most of our special hauling permits are granted for overlength, overwidth, and overheight loads.

but we do grant permits for loads in excess of 45,000 pounds gross because a lot of the equipment that is very large cannot be reduced to within the legal limits. So therefore we have the authority to issue permits covering that load. Now one permit is good for one movement only over roads stipulated by them. If we approve the load, we will therefore give them a permit for that movement.

Q. Did you say that you considered a load of gasoline a built-up load?

A. Yes, sir.

Q. Was it your testimony, sir, that you would not grant permits; that it was not your purpose to grant permits for excessive built-up loads?

A. That is correct.

Q. How long did it take one to get a permit in 1951?

A. If a person applies for a permit, we have a regular form that has to be filled out to apply for that permit. If that form is filled out and there is no one ahead of that person, (137) they can have that anywheres from three to five minutes.

Q. Can the application be over the telephone?

A. It can.

Q. But the permit has to be picked up physically by the person applying for it?

A. They can pick it up the same day they apply for it, or we can take it by telephone and mail it to them.

Mr. Armstrong: You may inquire.

Cross-Examination.

By Mr. Sarner:

Q. Mr. Forsyth, you say you operated your office in accordance with the statute of Pennsylvania, as I understood it.

A. Yes, sir.

Q. And you also just said that if someone called up on the phone they could get a permit by coming for it.

A. If someone called up on the phone and gave us the necessary information, we would have it typed up.

Q. And you could mail it to them?

A. Yes, sir.

Q. You are familiar with the statute, are you? Is this the statutory provision, Section 905, of the Vehicle Code of 1929 to which you refer?

(A document was handed to the witness.)

Q. You are familiar with that provision, are you?

A. Yes, I am.

(138) Q. Is that the one to which you refer?

A. That is the one, I believe Section 902, which also says that any load that can be part of a load taken off there must be taken off——

Q. That is not so, you say that is not so?

Mr. Armstrong: I object to counsel arguing with the witness.

Mr. Sarner: He referred to a particular section.

Mr. Armstrong: Mr. Sarner has not shown the witness a copy of Section 902. He is showing him certain sections, but it does not include Section 902.

The Witness: I think it is 902.

By Mr. Sarner:

Q. Is this the section to which permits for excessive size and weights refers, which reads——

The Court: Is that Section 905 you are reading?

Mr. Sarner: Yes. "The Secretary of Highways of this Commonwealth, and local authorities in their respective jurisdiction, may, in their discretion, upon application in writing accompanied by the fee provided in this Act, and good cause being shown therefor, issue a special permit, in writing——."

By Mr. Sarner:

Q. Now isn't it true, Mr. Forsyth, that it was not possible to call on the phone and get a permit?

A. You say it was?

(139) Q. It was not.

A. Yes, we take telephone calls. We will fill out the information for them, which we are allowed to do.

Q. And just on the mere telephone call you would issue the special permit without receiving the fee?

A. They generally pick them up.

Q. Generally, but you said you also mailed it to them at times.

A. That is correct.

Q. Without the fee being paid?

A. The fee is mailed in to us the same day. We tell them how much the fee is and they will mail us a check or money order.

The Court: But you said you would not have granted any permits in cases where the loads were liquid fuels where the load could have been reduced.

The Witness: That is correct. They are what we call a built-up load. Say, for instance, a man wanted to move steel plates and our gross load was 45,000 pounds and he wanted to move a gross load of 65,000 pounds. We would not grant him that permit for that excessive weight because he can take that off and still stay within the limits. On the excessive weight permits they are for large shovels, although we do require them to remove any part of that equipment they can to keep down as close as possible to the limits.

The Court: But it was not your practice to do that (140) for the loads which consisted of liquid fuels?

The Witness: That is right.

By Mr. Sarner:

Q. Mr. Forsyth, are you familiar with the carriage of certain chemicals by motor trucks such as sulfuric acid?

A. No, sir, I am not.

Q. Would you know whether sulfuric acid is a very heavy chemical?

A. No, I don't know that.

Q. Have any applications been made to your office with respect to the carriage of sulfuric acid in excessive weight?

A. Not to my knowledge.

Q. You would know?

A. I don't recall having one.

Q. Suppose you were told that sulfuric acid was a very volable liquid and that it was necessary that it be filled to capacity in a tank semi-trailer and also that the sulfuric acid was very heavy in weight and that the maximum load would be in excess of the 45,000 pounds plus the five per cent leeway allowed by the Pennsylvania statute in 1951. Would you have granted the permit under those circumstances?

Mr. Armstrong: I object to that question. This witness has stated that no such applications were made. I cannot see that it makes any difference at all what he would have done. The point is, no applications were made and he issued no permits.

(141) Mr. Sarner: Well, he is discussing more the question of the operations of his office. I just——

Mr. Armstrong: This is purely speculation, Your Honor.

The Court: Much of the testimony that has been obtained from this witness on direct as well as on cross has been of a similar speculative character revolving around the practice of this man's office, and I think this question comes within that range. He may answer.

The Witness: What I would do then, I would not issue the permit until he referred all the information to our regional office at Harrisburg.

By Mr. Sarner:

Q. That would take more than two or three minutes.

A. Oh, yes. It depends whether you can get hold of a person in charge. It might be a half hour, an hour, or half a day.

Q. Might be three days?

A. No, we would have the answer the same day.

Mr. Sarner: All right. No further questions.

Mr. Armstrong: No further questions.

* * *

(144) Mr. Sarner: Yes. With respect to the closing of the hearing, you may recall in my opening statement I pointed out that neither the petition nor the deficiency notice referred to the fines paid to various states other than Pennsylvania and that it might therefore be appropriate to amend the petition to accord with the stipulation of facts shown in the other states. I would prefer that it could be done without a submission of a new written amended petition, but if that is necessary I will be only too pleased to do so. I would move to have the petition amended to conform to the evidence which was introduced by the testimony relating to the fines paid to states other than Pennsylvania.

(145) The Court: Well, as far as the other states are concerned, I would not regard the existing pleadings as tying my hands, and I would take into account in that respect the stipulation of facts and the evidence developed which relates to the stipulation of facts.

Mr. Sarner: Under those circumstances I see no need to file a written amended petition.

* * *

Mr. Sarner: With respect to the previous motion which I made to allow me to introduce another witness out of turn, I would like to have noted that this witness is an expert in the engineering features of the equipment used by the carriers. He would testify that in his opinion the equipment which was in use and in operation in 1951 by the carriers, such as the taxpayer, carrying loads up to the 60,000 pounds allowed by the adjoining states, but carrying such a load in Pennsylvania would not cause any original damage to the roads; that the equipment was so engineered that it would not be an obstacle to the free movement of traffic on the highways of Pennsylvania whether it carried (146) loads of approximately 60,000 pounds or within the 45,000 pounds specified in the Pennsylvania statute.

Respectfully, I think that this matter can be demonstrated by the fact which is already in the record, that the adjoining states did allow a maximum weight of the approximate 60,000 pounds and that the same equipment used in operating in Pennsylvania was used in operating in these states; and further, that the Pennsylvania Legislature in 1955 recognized that possibly the earlier statutory maximum may have been somewhat antiquated in lieu of the more universal acceptance of the 60,000 pound weight by the other states.

Therefore, I think that it will not be necessary to call this witness. I would like to announce that I will not do so and that the Petitioner's case is closed.

The Court: Very well. The case is submitted.

DEPT. OF LAW AND PUBLIC SAFETY, DIVISION OF STATE POLICE
CHAS. H. SCHOEFFEL, Superintendent

No. 89780

MUNICIPAL COURT
of WESTVILLE, N.J.

STATE OF NEW JERSEY
COUNTY OF GLOUCESTER

SUMMONS

YOU ARE HEREBY SUMMONED TO APPEAR PERSONALLY BEFORE THIS COURT TO ANSWER FOR THE FOLLOWING OFFENSE:

ON THE 20 DAY OF FEBRUARY, 1951 AT 11:30 A.M.

(NAME) TANK TRUCK RENTALS INC.

(Please Print)

(STREET) LANCASTER R.D. #1.

(CITY—STATE) LANCASTER COUNTY, PA

(DRIVER'S LIC. NO.) [redacted], DID UNLAWFULLY (PARK) (OPERATE)

MOTOR VEHICLE (REG. NO.) Y-630-L PA

MAKE BROCKWAY BODY TYPE TRK & TRAIL COLOR RED

UPON A PUBLIC HIGHWAY, NAMELY AT (LOCATION)
ROUTE #44

AND DID THEN AND THERE COMMIT THE FOLLOWING OFFENSE: 39:3-84.3

Principal Causes of Accidents

SPEEDING (over limit) (___ m.p.h. in ___ m.p.h. zone)	5-10 m.p.h.	☐ 11-15 m.p.h.	☐ over 15 m.p.h.
IMPROPER TURN:	☐ No signal	☐ Cut corner ☐ Into wrong lane	☐ From wrong lane
DISREGARD OF TRAFFIC SIGNAL	☐ Slow sign	☐ Stop sign	☐ Red light
IMPROPER PASSING:	☐ At intersection	☐ Cut in	☐ Wrong side
CARELESS DRIVING:		☐ Following too closely	☐ Wrong side ☐ Right of way
RECKLESS DRIVING:			☐ ___

Six Principal Causes

DISREGARD OF TRAFFIC SIGNAL	☐ Slow sign	☐ Stop sign	☐ Red light
IMPROPER PASSING:	☐ At intersection	☐ Cut in	☐ Wrong side
CARELESS DRIVING:		☐ Following too closely	☐ Wrong side ☐ Right of way
RECKLESS DRIVING:			☐ ___

PARKING: ☐ Overtime ☐ Prohibited area ☐ Double parking

☐ Other parking violation (describe) ___

OTHER VIOLATIONS (describe) REG. WT. 45,000 LBS.
GR. WT., 50,110 LBS OV. WT. 5,110

CONDITIONS

				INFORMATION
☑ Clear	☐ Dawn	☐ Light traffic	☐ School zone	Birth date:
☐ Rain	☑ Day	☑ Heavy traffic	☑ Residential	Birthplace:
☐ Snow		☐ Personal injury		Sex:
☐ Ice	☐ Dusk	☐ Property damage	☐ Business	Height: ft. in.
				Weight: lbs.
☐ Fog	☐ Night	☐ Almost caused accident	☐ Other	Occupation:

YOU ARE NOTIFIED THAT THE OFFICER WHOSE SIGNATURE APPEARS BELOW WILL FILE A SWORN COMPLAINT IN THIS COURT CHARGING YOU WITH THE OFFENSE SET FORTH ABOVE.

Tpr. C.L. Thomas #911
(Signature and identification of officer)

NOTICE TO VIOLATOR: READ THE BACK OF THIS SUMMONS CAREFULLY. BRING SUMMONS WITH YOU.

COURT APPEARANCE: 6 DAY OF MARCH, 1951 AT 8 P.M.

ADDRESS OF COURT: BORO HALL WESTVILLE NJ

SUMMONS (Revised October, 1949) Parker Printing Co., Trenton

Exhibit 9

from carrying legal loads in Pennsylvania. Nor could the industry as a whole have increased its rates so as to enable it to operate vehicles profitably while complying with Pennsylvania law, without losing the business to the railroads and to the private refineries operating their own motor vehicle equipment.

Aside from the competitive disadvantage and the loss of revenue, neither petitioner nor the other carriers operated their equipment with less than maximum capacity of liquid in their tanks, except on rare occasions, by reason of the unsafe and hazardous condition which the surge in such partially loaded tanks created in stopping the motor vehicles and in negotiating the equipment around the curves of the highways. Some of the tanks of petitioner and of the industry were divided into three compartments. None of these multiple compartment tanks was engineered during World War II, and petitioner had only twenty of them in 1951. It was possible to avoid the road hazard of a partially loaded tank by filling two of the compartments to capacity and leaving the third empty. However, it was not feasible from the point of view of revenue to operate the equipment at two-third capacity. Moreover, in so far as the transportation of domestic fuel and Bunker C oils resulted in the equipment being overloaded under the Pennsylvania statute, such oils could only be carried in single and not in multiple compartment tanks.

During the taxable year, it was possible to purchase semi-trailer tanks having a capacity less than the 4,500 gallons minimum tank then in current operation by petitioner and the industry. However, it would not have been economical for petitioner to have scrapped its entire fleet of existing tanks and to have purchased smaller equipment which could have transported full loads at legal weights within the state of Pennsylvania. To have done this, while the other carriers continued to operate their existing equipment filled to capacity, would have put petitioner at a com-

OPINION OF THE TAX COURT.

The respondent determined a deficiency in income tax of petitioner for the year 1951 in the amount of $12,172.34.

The principal issue is whether fines paid by petitioner in 1951 for violating motor vehicle weight limitation laws of certain states are deductible as ordinary and necessary business expenses under the provisions of Section 23(a)(1)(A) of the Internal Revenue Code of 1939.

Findings of Fact.

A portion of the facts have been stipulated and are found accordingly.

The petitioner is a corporation duly organized on January 1, 1945 and existing under the laws of the State of Pennsylvania. It kept its books and filed its income tax return for the taxable year 1951 on a calendar year basis and on an accrual method of accounting.

The petitioner was during the taxable year 1951 engaged in the business of transporting bulk liquids by motor vehicles under lease or rental agreements with motor carriers holding operating certificates issued by the Interstate Commerce Commission and/or the Public Utility Commissions of the various states in and through which petitioner transported bulk liquids. Petitioner leased to the certificated carriers its motor vehicles and furnished the driver-operator of same as petitioner's employee.

During the taxable year, petitioner leased its equipment and supplied its own driver-operator for the following certificated motor carriers of bulk liquids: Coastal Tank Lines; Chemical Tank Lines, Lehman Transportation Company; Petroleum Transport, Inc.; Northland Petroleum Transport Company, and E. Brooke Matlack, Inc.

Petitioner and the carriers for whom it transported the bulk liquids were engaged in "over-the- road" transporta-

tion, which in the industry means the transportation of liquid commodities between towns or cities, but not solely within a municipality. Petitioner and its lessees transported a substantial portion of the bulk liquids carried over-the-road by all motor carriers in the states in and through which petitioner operated during the taxable year.

During the taxable year, petitioner operated its motor vehicles in the following states for the following approximate distances and ~~made the~~ following approximate number of trips:

State	*No. of Miles*	*No. of Trips*
Pennsylvania	6,110,798	77,385
Ohio	971,643	5,293
New Jersey	856,973	14,146
Delaware	383,612	2,984
Maryland	314,960	10,712
West Virginia	238,750	3,937
Totals	8,956,738	114,457

Petitioner and its lessees operated their vehicles in the transportation of bulk liquids both wholly within and between the aforementioned states. On approximately all of petitioner's trips, either the transportation took place wholly within Pennsylvania, or Pennsylvania was involved as the originating or destination state.

The motor vehicles used and operated by petitioner in the course of its business and leased during the taxable year consisted solely of truck tractor and semi-trailer tank combinations. Petitioner owned and operated 142 truck tractors, each of which had two axles, and 112 semi-trailers, of which 62 had a single axle and 50 had two axles.

The capacity of the tank on the single axle semi-trailers ranged from 4500 to 5000 gallons. The capacity of the tank on the two or tandem axle semi-trailers ranged from 4600 to 5900 gallons.

Petitioner's equipment in 1951 was substantially the same as that used and operated in the industry generally. The bulk of the semi-trailer fleet of the other carriers contained tanks with a capacity ranging from 4500 to 5000 gallons, although some carriers had a small percentage of tanks, 10 per cent or less of their entire fleet, with a capacity of 4000 gallons acquired mainly prior to the outbreak of World War II. During World War II, only tanks with a capacity between 4500 and 5000 gallons were available for purchase because of war restrictions on manufacture.

The unloaded weight of the truck-tractors owned and used by petitioner and the industry generally was approximately 12,000 pounds, and the unloaded weights of the single and tandem axle semi-trailer tanks were approximately 8,000 and 10,000 pounds respectively. The unloaded weight of the combination accordingly ranged between 20,000 pounds and 22,000 pounds.

The bulk liquids which petitioner and the industry commonly carried and their approximate weights were as follows:

Gasoline	6 lbs. a gallon
Kerosene	6¾ lbs. a gallon
Domestic Fuel Oil	7 lbs. a gallon
Bunker C Oil	8 lbs. a gallon

Prior to and during the taxable year, each of the aforementioned states prescribed by statute the maximum weight for motor vehicles using the public highways of the respective states. The statutory maximum gross weight for the truck tractor and semi-trailer combination owned, used and operated by petitioner was, for each of these states in 1951, as follows:

State	Statutory Citation	Maximum Gross Weight
Pennsylvania	75 P.S. § 453(g)	45,000 lbs.
New Jersey	N.J.S.A. § 39.3-84	60,000 lbs.
Ohio	Page's Ohio Gen. Code Anno. § 7246	Statutory formula which results in range from 57,000 to 67,600 lbs.
Delaware	Del. Code Anno. Title 21, Chapter 45, § 4503	48,000 lbs. for single axle trailers; 60,000 lbs. for tandem axle trailers
West Virginia	1951 Supp. to West Va. Code of 1949 Anno. § 1721. (463)	Statutory formula which results in range from 54,000 to 60,800 lbs.
Maryland	Flack's 1951 Anno. Code of Maryland § 278, Art. 66½	Statutory formula which results in gross weight of 65,000 lbs.

In the conduct of its business, petitioner would receive instructions from the certificated carriers to whom it leased its equipment to pick up and transport the bulk liquid from one point to another. Although the amount of liquid which was loaded into petitioner's semi-trailer tanks was supervised by loaders employed by the source furnishing the product, it was the practice of petitioner, pursuant to orders from petitioner's management, that all tanks be loaded to maximum capacity consistent with a small 3 per cent tolerance for expansion.

In 1951, it was the common and widespread practice of the petitioner and other over-the-road bulk liquid carriers by motor vehicle, operating in Pennsylvania and the other States herein involved, to fill semi-trailer tanks to capacity with bulk liquid.

During the taxable year, petitioner incurred and paid sums characterized by the laws of the aforesaid states as fines in the total amount of $37,965 for operating on the highways motor vehicles in violation of state statutes prescribing weights of motor vehicles. Of this $37,965, the sum of $35,165 constituted fines imposed for exceeding the maximum weights prescribed by the statute of the state in which the fine was imposed. The balance, or $2,800 of the sum of $37,965, constituted fines imposed on petitioner by New Jersey for operating in New Jersey a vehicle which exceeded the maximum gross weight prescribed by the Pennsylvania statute, but did not exceed the 60,000 pounds gross weight otherwise prescribed by the New Jersey statute. Such New Jersey fines were imposed with respect to Pennsylvania vehicles operating in New Jersey, in accordance with the reciprocity provisions of New Jersey law which made applicable the Pennsylvania weight limitation to Pennsylvania vehicles on New Jersey roads.

The following table shows with respect to the taxable year involved the number and dollar amounts of fines and costs paid by petitioner to each of the states involved:

State	Number of Fines	Dollar Amt. of Fines	Dollar Amt. of Costs	Total
Pennsylvania				
at $50. each	649	$32,450.00	$2,709.40	$35,159.40
at $25. each	62	1,550.00	226.75	1,776.75
New Jersey	7	2,800.00	30.00	2,830.00
Maryland	7	410.00	29.91	439.91
Ohio	9	405.00	51.10	456.10
West Virginia	10	320.00	39.68	359.68
Delaware	2	30.00	9.00	39.00
	746	$37,965.00	$3,095.84	$41,060.84

Petitioner's vehicles made approximately 77,385 trips during the taxable year in and through Pennsylvania. During the summer months in the state of Pennsylvania, petitioner's vehicles carried a weight in excess of the maximum gross weight prescribed by the statute on approximately 60 per cent of the trips, and during the winter months, petitioner's vehicles were overweight in Pennsylvania on approximately 75 per cent of the trips. With petitioner's maximum 4500 gallon tank filled to capacity, petitioner was able to carry only gasoline weighing 6 lbs. a gallon, or a gross product weight of some 27,000 lbs., and be within the legal weight limitations of 45,000 lbs., plus the 5 per cent leeway allowed by the Pennsylvania statute for equipment and product. During the summer months, petitioner carried gasoline on approximately 40 per cent of its trips. However, during the winter months, gasoline consumption by the public was reduced and the carriage of domestic fuel and Bunker C oils constituted an increased portion of petitioner's business. Petitioner's vehicles, when filled to capacity with domestic fuel or Bunker C oils, weight 7 and 8 pounds a gallon respectively, carried at least a product gross weight ranging from 31,500 pounds to 36,000 pounds, which, together with the unloaded weight of equipment of at least 20,000 pounds, exceeded the Pennsylvania maximum gross weight.

Petitioner knew, at the time its vehicles were overloaded in the state of Pennsylvania, that it was operating vehicles which exceeded the Pennsylvania maximum gross weight requirements, and this knowledge pertained to the 711 times for which petitioner was fined. On many of the other trips, however, petitioner's vehicles were not stopped by the police and weighed and consequently petitioner was not fined.

Petitioner was taking a calculated risk that its overweight vehicles would not be discovered on a percentage of the times that its vehicles exceeded the Pennsylvania weight limitations.

All the violations for which petitioner paid fines in Pennsylvania and all the times that petitioner knew its equipment was being operated overloaded in Pennsylvania, pertained to exceeding the Pennsylvania 45,000 pound maximum gross weight plus the 5 per cent leeway. Pennsylvania and the other states herein involved also prescribed by statute limitations on the axle weight per vehicle. However unlike a dry freight motor carrier, where the load can shift to or be built up disproportionately over one axle, the bulk liquid equipment is so engineered that the liquid load is a constant weight over each axle. Hence, on only rare occasions would a bulk liquid motor carrier, carrying a permissive maximum gross weight, be in violation of an axle weight requirement as where a particular truck tractor would not combine properly with a particular semi-trailer tank.

Petitioner did not knowingly operate its vehicle in New Jersey carrying a weight in excess of the 60,000 pounds maximum gross weight prescribed by the New Jersey statute for motor vehicles bearing New Jersey license tag registration. However, under the reciprocity provision of the New Jersey statute, a motor vehicle registered in another state, such as Pennsylvania, was restricted in its gross weight, in using the New Jersey highways to the maximum gross weight allowed by the state where the vehicle is registered. Hence petitioner's Pennsylvania licensed motor vehicles were restricted in operating on the New Jersey highways to the Pennsylvania maximum gross weight of 45,000 pounds, plus the 5 per cent leeway, whereas the same equipment bearing a New Jersey license tag registration was allowed to use the highways of New Jersey bearing a gross weight of 60,000 pounds.

Petitioner was fined a total of seven times by the New Jersey authorities for operating overweight equipment on the New Jersey highways and all of the fines per-

tained to carrying a weight on the New Jersey highways in excess of the 47,250 pounds allowed by Pennsylvania law but less than the 60,000 pounds allowed by New Jersey law. On these seven trips and on many other occasions petitioner knowingly operated and knew at the time that it was operating vehicles in New Jersey bearing a weight under the 60,000 pounds, but in excess of that allowed by the Pennsylvania statute. On the other occasions, however, petitioner's vehicles were not stopped by the police and consequently petitioner was not fined.

In the remaining states of Maryland, Ohio, West Virginia and Delaware, petitioner paid a total of twenty-eight fines for operating overloaded vehicles exceeding the maximum weights prescribed by the statute of the state in which the fine was imposed. Petitioner, at the time these twenty-eight trips took place, did not know that its vehicles were overloaded in any respect. Although it is possible that some of the petitioner's vehicles were overloaded in these states on trips other than the twenty-eight for which petitioner was fined, petitioner did not operate at any time any vehicles in these states with knowledge that the weight of the vehicle exceeded the maximum prescribed by law.

Petitioner's conscious and deliberate overloading was confined to Pennsylvania and to New Jersey in so far as the reciprocity provision of the New Jersey statute was applicable. In all the other states, any operation of overloaded equipment by petitioner, for which petitioner was either fined or not, was inadvertent and without knowledge of petitioner at the time of the trip.

Various factors could have caused and did cause petitioner's vehicles to exceed at times the maximum weight requirements of the various states without petitioner's fault or knowledge at the time of the trip; the principal factors were:

(a) The nature of the loading process, whereby employees of the shipper, in order to assure customers of the

shipper full measure at destination, filled the tanks, in order to take care of possible shrinkage in transit, beyond the maximum capacity consistent with the small 3 per cent tolerance for expansion;

(b) Changes in temperature during transit, whereby a vehicle, within legal weight limits at point of origin, could pick up snow and ice which would cling to the vehicle causing it to be overweight en route;

(c) Loading by gallonage, which was the common practice by reason of the fact only a few of the refineries where the load originated used scales, coupled with residual variations in the weight per gallon of the product, in some cases a variance of one pound per gallon, so that reliance on average weight, which was the only measure feasible, was not accurate; and

(d) Combination improperly of a particular truck tractor and semi-trailer tank, so as to cause an axle overload.

Petitioner's practice of knowingly exceeding the Pennsylvania weight limitations in the operation of its vehicles was not confined to the taxable year 1951, but existed prior thereto. At the time of petitioner's incorporation on January 1, 1945, only single compartment tanks of no less than 4,500 gallon capacity were available due to World War II restrictions relating to the conservation of steel and the attempt to have a uniform standardized size of tank for maximum utility which would comply generally with the weight restrictions of most of the states of the United States. It had been the uniform practice in the industry during the war years to fill the tanks to capacity and this practice continued unabated for petitioner and the other carriers during the taxable year. Except where gasoline weighing approximately 6 pounds a gallon was carried, a full load of the other commonly transported bulk liquids resulted in a maximum gross weight of over 45,000 pounds.

plus the 5 per cent leeway, prescribed by the Pennsylvania statute, but normally under the 60,000 pounds approximately prescribed by the other states. Thus, the industry as a whole knew at the time it was operating its tanks filled to capacity on the Pennsylvania highways that the equipment was overweight except for the carriage of gasoline.

The revenue of petitioner, and of its lessees and of the industry generally operating their own equipment was predicated on rates based on the number of gallons transported per mile. Revenue for petitioner and the industry generally in 1951 was thus keyed to the uniform practice of filling the tanks to capacity. In order to have carried weights within the limitations of the Pennsylvania statute, petitioner would have had to reduce its revenue per gallon hauled, while operating costs would have increased because of the additional number of trips required, thus causing petitioner to operate at a loss. Petitioner could not have increased its rental charge to its lessees per gallon hauled to compensate for transporting a smaller number of gallons each trip, since the competitive practices in the industry were such that had petitioner demanded an increased rental from its lessees, while the industry generally was filling its tanks to capacity and exceeding the Pennsylvania weight limitations, petitioner would have forced itself out of business. The lessees would have referred the business to other lessors of equipment, or would have carried the liquid in their own fleet of vehicles.

Competition among themselves and with the railroads and private carriers of the refineries played a major part in the continuance of the practice by the over-the-road motor carriers of bulk liquids to key their rates to tanks filled to capacity and consciously to exceed the Pennsylvania weight limitations. So long as its competitors maintained the practice of carrying the minimum of 4,500 gallons on each trip and of paying the fines when the violations were discovered, no carrier could increase its rates to compensate for the reduction in operating revenue which would result

petitive disadvantage in so far as rates and revenue were concerned.

Although Pennsylvania was the focal point of petitioner's operations, the essence of petitioner's lease arrangements with the certificated carriers was the assurance that petitioner's fleet would be available at peak periods in other states and for interstate carriage, as well as in Pennsylvania. The equipment in the industry must be flexible in the sense it can economically be used generally throughout the states in which it is operated. The rate structure in the states neighboring Pennsylvania in and through which petitioner and the other carriers operated their vehicles was based on hauling maximum gallonage per trip consistent with the gross weight laws of approximately 60,000 pounds. Equipment of the size suitable for legal weight in Pennsylvania could not have been economically operated in the other states.

The Pennsylvania statute and the statutes of the other states herein involved have provisions for the obtaining of a permit for a fee from designated state authorities for the operation of motor vehicles on the highways of the respective states bearing a weight in excess of the maximum therein normally prescribed. The fee for such a permit in Pennsylvania is $5.00 plus two cents per ton of 2,000 pounds overweight per mile. It was the policy of the State of Pennsylvania not to issue permits where material could be taken off the vehicle so as to reduce the gross weight thereof to 45,000 pounds.

The industry practice, followed by petitioner, was not to seek permits for operating the equipment in excess of the maximum prescribed by the Pennsylvania statute.

As a consequence of the practice to fill the tanks to capacity and operate equipment exceeding the maximum gross weight allowed by Pennsylvania law, petitioner and three of its lessees, during 1951, frequently had their vehicles stopped by the police and had to pay fines for operating the overloaded equipment in Pennsylvania.

They knowingly violated the Pennsylvania motor vehicle weight laws a substantial number of times in excess of the number of times their vehicles were stopped by the police and fined.

Fines for operation of overloaded equipment in the states involved herein, other than Pennsylvania, were infrequent because the approximate 60,000 pounds maximum gross weight assured capacity use of the standard equipment. The experience of the other carriers in the industry with respect to the operation of overloaded equipment in these other states was substantially the same as that of petitioner, namely, that with the exception of violations of the reciprocity provision of the New Jersey statute, only occasionally were they fined because their motor vehicles were overweight in these states, the carriers being unaware at the time that the vehicles were overweight.

The following table shows, with respect to the taxable year 1951, the number and dollar amount of fines imposed and paid in Pennsylvania as a result of the enforcement by the Pennsylvania State Police of the Pennsylvania statute prescribing maximum gross weight for motor vehicles:

No. of vehicles stopped and weighed	182,082
No. of Fines for vehicles over 5% and less than 10% overweight	7,875
Dollar amount of fines for vehicles over 5% and less than 10% overweight	$196,875.00
No. of fines for vehicles over 10% overweight	20,540
Dollar amount of fines for vehicles over 10% overweight	$1,027,000.00
Total No. of fines	28,415
Total dollar amount of fines	$1,223,875.00

The above table does not reflect any enforcement activities by police of Pennsylvania municipalities or political sub-

divisions. The records of petitioner indicate that approximately 60 per cent of petitioner's violations, on which arrests were made, were enforced by the Pennsylvania State Police and the remaining 40 per cent by the police of the local Pennsylvania municipalities.

Pursuant to the provisions of the Pennsylvania statute for operating motor vehicles with a weight in excess of the maximum prescribed by law, notice of violation was sent to and the fine was imposed on the driver of the vehicle, petitioner's employee. Under the provisions of the statutes of the other states involved herein, the fine was imposed on petitioner as the owner of the overweight vehicle.

Petitioner had contracts in full force and effect during and prior to the taxable year with its driver-employees represented by A.F.L. unions under the terms of which petitioner was obligated to bear all costs in connection with the operation of overloaded equipment. In accordance with the contracts, petitioner paid in the taxable year all the fines imposed by the State of Pennsylvania on its driver-employees for operating the overloaded equipment. Several other trucking organizations also followed this practice.

Petitioner's drivers had the responsibility for and paid without reimbursement from petitioner, any fines imposed for parking, speeding or driving violations.

As between petitioner and its lessees, the fines incurred by petitioner's operation of vehicles in excess of the maximum weight prescribed by law were payable solely by petitioner and petitioner had no arrangement with its lessees that it was to be reimbursed for the payment of these fines or any part thereof.

None of petitioner's drivers was imprisoned or had his license suspended or was subjected to any sanction other than a fine for operating petitioner's vehicles overweight in Pennsylvania in 1951, and this was true for the employee-drivers of other carriers.

No sanctions were imposed by the State of Pennsylvania on petitioner or other carriers in 1951 for operating the overloaded equipment, other than by way of the fines imposed on the driver-employees. The Pennsylvania statute provides for removal of the excess load in the discretion of the enforcement authorities before the vehicles can continue en route. Petitioner was never required by the Pennsylvania authorities to remove any excess load before its overweight motor vehicle was permitted to continue on the Pennsylvania highways.

During the years of World War II and up to the latter part of 1950, petitioner's overweight vehicles were not stopped by the Pennsylvania authorities.

The Interstate Commerce Commission prescribes a uniform system of accounting in the keeping of books and records and in the preparation of reports required to be filed with it by motor carriers subject to its jurisdiction. The Pennsylvania Public Utility Commission follows, adopts and interprets accounting words and phrases and prescribes that annual reports which may be required to be submitted to it by motor carriers be prepared in accordance with the Uniform System of Accounts prescribed by the Interstate Commerce Commission.

Petitioner did not, during the taxable year 1951, hold any operating certificate issued by the Interstate Commerce Commission and/or by the Pennsylvania Public Utility Commission, and, accordingly, was not required to nor did it for the taxable year 1951, file any annual reports with either Commission.

It was the practice in 1951 of motor carriers required to keep books and records for, and to file reports with, the Interstate Commerce Commission and/or Pennsylvania Public Utility Commision to include fines for operating motor vehicles in excess of the weight prescribed by state law as an operating expense item in Account No. 4280 of the Uniform System of Accounts entitled "Other trans-

portation expenses" under the listed category "Fines for traffic violations".

Examination and review of the books, records and reports of motor carriers under its jurisdiction is periodically made by the Interstate Commerce Commission. No change or adjustment was made for the year 1951 or years prior thereto with respect to the reporting of the fines for violating the state weight laws in Account No. 4280.

A distinction is made in the Uniform System of Accounts between operating revenue and operating expense on the one hand, and other revenue and other expense, on the other hand. Items of operating expense are considered, and items of non-operating expense are not considered by the Interstate Commerce Commission for rate making purposes. Penalties and fines for violations of law, except fines for traffic violations, are reported as a non-operating expense item in Account No. 7500 of the Uniform System of Accounts.

On June 30, 1955, Act No. 70, amending the Pennsylvania Vehicle Code was enacted providing, inter alia, for the combination of truck tractor and semi-trailer motor vehicles used by the bulk liquid motor carrier industry, a maximum gross weight of 50,000 pounds for the single axle semi-trailers and of 60,000 pounds for the tandem axle semi-trailer, effective on date of enactment.

In most instances, in the taxable year, the gross weight of each of petitioner's vehicles using the Pennsylvania highways was less than 60,000 pounds.

Petitioner filed with the collector of internal revenue for the first district of Pennsylvania a U. S. Corporation Income Tax Return for the calendar year 1951. Included in the item of "Transportation Expense" in Schedule B—Cost of Operations in the amount of $593,066.08, was the amount of $41,060.84, representing fines and costs paid by petitioner for violating state motor vehicle weight laws. The respondent determined that the $41,060.84 did not constitute a deductible expense.

OPINION.

RAUM, *Judge*: 1. Petitioner seeks to deduct under Section 23(a)(1) of the Internal Revenue Code of 1939 the fines and costs paid by it in 1951 for operating motor vehicles in violation of state weight limitation laws. Its principal contention is that such payments constituted ordinary and necessary business expenses. Since most of the violations occurred in Pennsylvania, we shall consider that contention first in relation to the fines paid to that state.

Pennsylvania had lower weight limits than the other states, and petitioner's vehicles when fully loaded with liquids other than gasoline were in excess of the legal limit in Pennsylvania. Nevertheless, petitioner as well as other carriers in Pennsylvania consistently and deliberately loaded their vehicles so as to exceed the permissible limit. The carriers might have applied for permits, upon payment of a fee, to exceed the legal limit, but the procedure was somewhat cumbersome, and it was highly doubtful whether such permits would have been granted. Moreover, the fees required for such permits were not insubstantial, and the evidence suggests that in view of the comparatively small percentage of cases in which violations were detected, it was thought to be more advantageous to take the risk and pay the fine. The violations were conscious and deliberate; they represented a calculated risk taken by the petitioner and other carriers.

True, the violations were widespread and common, and the evidence also disclosed that unless petitioner did engage in such practices it would have been at a competitive disadvantage in the operation of its business. Yet, these considerations do not justify the deduction in the light of the decisions in this field.

It has long been recognized that the payment of fines or similar penalties is not deductible as an ordinary and necessary business expense. See, e.g., *Commissioner v. Longhorn Portland Cement Co.*, 148 F. 2d 276 (C. A. 5), cer-

tiorari denied, 326 U. S. 728; *Helvering v. Superior Wines & Liquors*, 134 F. 2d 373, 376 (C. A. 8); *Burroughs Building Material Co. v. Commissioner*, 47 F. 2d 178 (C. A. 2); *Great Northern Ry. Co. v. Commissioner*, 40 F. 2d 372 (C. A. 8); *William F. Davis, Jr.*, 17 T. C. 549; *Davenshire, Inc.*, 12 T. C. 958; *Bonnie Bros., Inc.*, 15 B. T. A. 1231, 1236. Cf. *Commissioner v. Heininger*, 320 U. S. 467, 473; *Lilly v. Commissioner*, 343 U. S. 90.

The laws of Pennsylvania, in effect in 1951, expressly prohibited the operation on its highways of vehicles whose gross weights exceed certain fixed amounts and provided that operators of overweight vehicles should, upon conviction, pay specified fines and costs of prosecution, and in default of payment thereof, should undergo imprisonment for not more than five days in cases where the vehicle did not exceed by more than ten per centum the maximum weight allowed, and for not more than ten days where the vehicle did exceed by more than ten per centum the maximum weight allowed. Vehicle Code of Pennsylvania, Act of May 1, 1929, P. L. 905, Section 903, as amended; 75 P. S. § 453. The purpose of these laws was to protect the highways and bridges from damage and to insure the safety of persons traveling over them. *McDonald v. Pennsylvania R. Co.*, 210 F. 2d 524, 528 (C. A. 3); *W. J. Dillner Transfer Co. v. Messner*, 371 Pa. 356, 359, 89 A. 2d 516, 518; *Commonwealth v. Burall*, 146 Pa. Super. 525, 529, 22 A. 2d 619, 622. They were not remedial laws having as their purpose the recovery of damage to the highways or bridges even though, as petitioner points out in its brief, they provided that the fines and penalties collected be used for the construction, repair and maintenance of highways. Vehicle Code of Pennsylvania, *supra*, Section 1207, as amended; 75 P. S. § 737. They were "penal" laws, *Commonwealth v. Burall*, *supra*, 126 Pa. Super. at p. 529, 22 A. 2d at page 622, and were enacted to enforce obedience to prescribed weight limitations and to punish violators.

Under contracts entered into with its driver-employees, petitioner was obligated to bear all costs in connection with violations of laws of Pennsylvania against operating overloaded vehicles when its drivers were required to operate such equipment. Pursuant to these agreements it paid fines and costs to the State of Pennsylvania in the year 1951 in the amount of $36,936.15. Inasmuch as they were criminal penalties imposed for violations of state laws, their allowance as deductions would have the effect of mitigating the degree of punishment and of frustrating the purpose and effectiveness of those laws. On the authority of cases heretofore cited, we hold they are not deductible.

A unique situation is presented as to the seven fines and costs aggregating $2,830 paid to New Jersey. The New Jersey limit was 60,000 pounds, but its law had a reciprocity provision whereby a vehicle registered in Pennsylvania had to comply with the stricter Pennsylvania requirements. Accordingly, although petitioner's vehicles, in these seven instances, were under the 60,000 pound limit otherwise permissible in New Jersey, they were in excess of the 45,000 pound limit (plus the five per cent leeway) permitted under Pennsylvania law, and therefore were in violation of New Jersey law. For reasons best known to itself, New Jersey has undertaken to accommodate its penal provisions to those of Pennsylvania in these circumstances, and it made it a criminal offense to operate Pennsylvania vehicles on its roads which exceeded the lower Pennsylvania limits. These violations were just as deliberate as the ones occurring in Pennsylvania itself, and the fines and costs are similarly not deductible.

There remain for consideration the fines paid by petitioner for overweight violations of the laws of Maryland, Ohio, West Virginia and Delaware. Petitioner urges that the allowance of these fines as deductions would not frustrate any sharly defined policy of the laws of those states because they were common to the industry as a whole and were innocent, non-negligent, and not the result of failure

to take practicable precautions. In support of this contention the petitioner relies upon *Jerry Rossman Corporation v. Commissioner*, 175 F. 2d 711 (C. A. 2), and related cases in which it was held that civil penalties for overcharges under the Emergency Price Control Act which were neither wilful nor the result of failure to take practical precautions were deductible as ordinary and necessary business expenses. See also *National Brass Works v. Commissioner*, 182 F. 2d 526 (C. A. 9); *Commissioner v. Pacific Mills*, 207 F. 2d 177 (C. A. 1). The applicability of such cases to situations such as the one before us was considered by the United States District Court for the Middle District of Tennessee in *Hoover Motor Express Co., Inc. v. United States*, 135 F. Supp. 818. In holding that fines paid for violations of state laws prescribing maximum weight limitations were not deductible as ordinary and necessary business expenses, the court said (pp. 820, 822):

> In the view which the Court takes of the case, it is not necessary to determine whether the plaintiff did all which should reasonably be required of it as a prudent operator to comply with the weight limitations involved. Assuming that it took every precaution that could fairly be demanded consistent with a practical operation of its business, and assuming further that it did not act with wilful intent, the Court is of the opinion that to allow the claimed deductions from gross income for the taxable years would nevertheless frustrate the clearly defined policies of the applicable state weight limitation laws.
>
> There can be no doubt that the underlying policy of the laws under which the fines were paid is not only to protect the highways of the state but also to protect the persons using them. Violations of the statutes are punishable by the imposition of a fine which is penal in character. No distinction is made in the statutes between an innocent or non-negligent violation, on the

one hand, and one which is either wilful or due to a negligent failure to take adequate precautions, on the other hand. It was evidently considered that the purposes of the statutes could be accomplished more effectively by treating all violators alike. This thought is borne out by the provisions commonly found in statutes of this character that the Commissioner of Highways, or other proper authority, shall have discretionary power to grant special permits for freight movements in excess of the prescribed weight limitations, the inference being that, in the absence of such special permit, neither hardship nor good faith shall constitute a defense to a violation.

* * *

* * * in the OPA cases there was statutory authority for a distinction between innocent and wilful violators, and since the Act itself made the distinction, it was possible to find that the allowance of an innocent and non-negligent overcharge as a deduction would not in any way impair or frustrate the policy of the Act. But the policy of the state weight limitation laws under consideration is to place all violators on the same basis without recognition of degrees or character or guilt. This being true, it would clearly frustrate the policy of the statutes if the distinction should be made by a court in applying the provisions of Section 23(a)(1)(A) of the Internal Revenue Code. To the extent that the deductions should be allowed because of innocence or due care the taxpayer would be relieved of the consequences of his violation, although the state law itself made no such distinction.

The District Court's opinion is an effective answer to the contentions of the petitioner, and we follow it here. We hold that the fines paid by it to the States of Maryland, Ohio, West Virginia and Delaware are not deductible as ordinary and necessary business expenses.

2. Petitioner makes an alternative contention, limited to the various fines and costs paid to Pennsylvania, where they were formally imposed upon the employee-driver of the overweight motor vehicle and not on the owner. Petitioner's contention is that such payments are deductible as reasonable compensation for services rendered. This argument is without merit. Under a contract with its drivers petitioner was obligated to bear all costs in connection with violations of laws against operating overloaded equipment whenever its drivers were required to operate such equipment. It required its drivers to operate overloaded equipment and fines imposed for violations of state laws thus became its responsibility and it paid the fines. These payments were clearly not made for the purpose of compensating drivers "for personal services actually rendered" and are not deductible as compensation paid under Section 23(a)(1)(A), *supra*.

Decision will be entered for the respondent.

DECISION.

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed May 31, 1956, it is

ORDERED AND DECIDED: That there is a deficiency in income tax of $12,172.34 for the year 1951.

Entered: June 12, 1956

(Signed) ARNOLD RAUM
Judge.

[fol. 139] IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,060

TANK TRUCK RENTALS, INC., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

Argued January 25, 1957

Before Biggs, Chief Judge, and McLaughlin and Hastie, Circuit Judges.

OPINION OF THE COURT—Filed March 6, 1957

By McLAUGHLIN, *Circuit Judge.*

Petitioner during the year 1951 was a motor carrier transporting bulk liquids. It supplied vehicles and driver-operators to various "over-the-road" carriers holding operating certificates from the Interstate Commerce Commission. During 1951, it paid fines totalling $37,965.00 imposed [fol. 140] on its drivers for operating on the highways motor vehicles in violation of state statutes limiting weights of motor vehicles.[1] Most of the fines were paid in Pennsyl-

[1] The following table shows with respect to the taxable year involved the number and dollar amounts of fines and costs paid by taxpayer to each of the states involved:

State	Number of Fines	Dollar Amt of Fines	Dollar Amt of Costs	Total
Pennsylvania				
at $50. each	649	$32,450.00	$2,709.40	$35,159.40
at $25. each	62	1,550.00	226.75	1,776.75
New Jersey	7	2,800.00	30.00	2,830.00
Maryland	7	410.00	29.91	439.91
Ohio	9	405.00	51.10	456.10
West Virginia	10	320.00	39.68	359.68
Delaware	2	30.00	9.00	39.00
	746	$37,965.00	$3,095.84	$41,060.84

vania which had a particularly low maximum weight law at that time.[2] The New Jersey fines sought to enforce the Pennsylvania maximum weight provision through reciprocity provisions of the New Jersey statute. The fines paid in states other than Pennsylvania and New Jersey resulted from unintentional overloading.

As a matter of economic policy petitioner deemed it expedient to overload and run the risk of an occasional fine. The Tax Court found that it had been the general practice of the trucking industry to overload in Pennsylvania and chance the fines with the result that petitioner would have [fol. 141] been at a competitive disadvantage if it had attempted to conform to the law. In 1955, the Pennsylvania maximum load limits were raised substantially.[3]

The rule that certain expenditures otherwise ordinary and necessary under Section 23(a)(1)(A) of the Internal Revenue Code of 1939 are not deductible if their allowance would frustrate sharply defined national and state policies is of judicial origin. *Commissioner* v. *Heininger*, 320 U.S. 467 (1943).

In *Hoover Motor Express Co.* v. *United States*, 135 F. Supp. 818 (D.C.M.D. Tenn. 1955), affirmed January 4,

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[2] The statutory maximum gross weight for the truck tractor and semi-trailer combination owned, used and operated by taxpayer was, for each of these states in 1951, as follows:

State	Statutory Citation	Maximum Gross Weight
Pennsylvania	75 P.S. § 453(g)	45,000 lbs.
New Jersey	N.J.S.A. § 39.3-84	60,000 lbs.
Ohio	Page's Ohio Gen. Code Anno. § 7246	Statutory formula which results in range from 57,000 to 67,600 lbs.
Delaware	Del. Code Anno: Title 21, Chapter 45 § 4503	48,000 lbs. for single axle trailers; 60,000 lbs. for tandem axle trailers
West Virginia	1951 Supp. to West Va. Code of 1949 Anno. § 1721 (463)	Statutory formula which results in range from 54,000 to 60,800 lbs.
Maryland	Flack's 1951 Anno. Code of Maryland § 278, Art. 66½	Statutory formula which results in gross weight of 65,000 lbs.

[3] Act #70 of June 30, 1955, amended the Pennsylvania Vehicle Code, 75 P.S. §§ 453, 454.

1956, 6 Cir., F.2d , the District Court made an exhaustive examination of the pertinent case law and held overloading fines were not deductible by a motor carrier. Petitioner seeks to distinguish the Hoover opinion on the grounds that: (1) there was a greater disparity in the Pennsylvania weight limitation and those of the adjoining states; (2) the economic factors are more compelling in this instance; and (3) the Pennsylvania enforcement policy was sporadic or discriminatory. These broad allegations add nothing substantial to petitioner's wholly untenable theory. Under it the federal court on a tax controversy would be required to examine not only the merits of particular criminal cases in the state courts, but indeed the wisdom of a state motor vehicle statute and the regularity of its enforcement. State legislatures are the determinative tribunals in those areas. Once it is concluded that the regulation is within the sphere of proper legislative action the courts will not gainsay the legislature on just where the arbitrary line between allowable and proscribed weights should be drawn. Nor is it appropriate at this juncture to review state enforcement policies. Such must be the rule if there is to be any semblance of order on this and similar questions. The weight limit law is not to be considered a mere [fol. 142] revenue measure, as petitioner suggests, simply because the fines collected are assigned to road repair. It has been held by this court that the disputed law is for the protection of the citizenry of Pennsylvania as well as the public roads. See *McDonald* v. *Pennsylvania R. Co.*, 210 F.2d 524 (3 Cir. 1954) involving a death claim arising in part from disregarding this statute regulating overweight vehicles.

Petitioner seeks to support its theory by *Jerry Rossman Corporation* v. *Commissioner*, 175 F.2d 711 (2 Cir. 1949), which allowed deductions of overcharges paid over to the government under the Emergency Price Control Act of 1942. See also *National Brass Works* v. *Commissioner*, 182 F.2d 526 (9 Cir. 1950); and *National Brass Works* v. *Commissioner*, 205 F.2d 104 (9 Cir. 1953). Those decisions turn on the legislative history of the price control statutes which indicated a distinction between wilful breach and

innocent mistake. That distinction does not exist in the governing motor vehicle law now before us, and even if it did petitioner's offenses in Pennsylvania and New Jersey were admittedly wilful. The transgressions in other states, though unintentional, were in disregard of the local laws. Further, the O.P.A. cases rely on the unusually complex regulatory scheme in the price control law, which problem does not confront a motor carrier with respect to weight limit restrictions. The O.P.A. penalty required merely that the unlawful income be paid over to the government. That purpose was not frustrated in a non-wilful case by relieving the taxpayer of the tax burden on the income so disgorged. As Judge Learned Hand wrote in Rossman (p. 713), "We think * * * in short that there are 'penalties' and 'penalties', and that some are deductible and some are not".

We hold it clear that the state statutes involved are as said in *Commissioner* v. *Heininger, supra*, the creation of "sharply defined state * * * policies"; that they are "state policies evidenced by some governmental declaration of them". *Lilly* v. *Commissioner*, 343 U.S. 90, 97 (1951). [fol. 143] The Court that fashioned those phrases could not have had in mind a more typical example than motor vehicle laws.

The decision of the Tax Court will be affirmed.

[fol. 144] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12,060

TANK TRUCK RENTALS, INC., Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

ON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES

Present: Biggs, Chief Judge, and McLaughlin and Hastie, Circuit Judges.

JUDGMENT—March 6, 1957

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed.

Attest:

Ida O. Creskoff, Clerk.

March 6, 1957

[fol. 147] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 145] SUPREME COURT OF THE UNITED STATES

No. 932, October Term, 1956

[Title omitted]

ORDER ALLOWING CERTIORARI—June 17, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is consolidated with No. 862 and a total of two hours allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Under the Pennsylvania statute the fines for operating overloaded vehicles within local municipalities were required to be paid to and used by such local municipality for the construction, repair and maintenance of its highways (132a, 75 P. S. § 737).

Imprisonment of the driver of a Pennsylvania overweight vehicle was provided for only upon default in payment of the fine. None of the petitioner's drivers was ever imprisoned, had his license suspended or was subjected by the Pennsylvania authorities charged with enforcing the overweight provision to any sanction other than the fine, and this was true for the employee-drivers of the other carriers (128a, 75 P. S. § 453).

During the years of World War II and up to the latter part of 1950, petitioner's overweight vehicles were not stopped and fined by the Pennsylvania enforcement authorities (129a).

The Pennsylvania statute provided for removal of the excess load in the discretion of the enforcement authorities before the overweight vehicle could continue enroute, but neither the petitioner nor the other carriers was ever required to remove any excess load before its overweight vehicle was permitted to continue on the Pennsylvania highways. In some instances the other states did enforce a similar type removal provision (44a-45a, 82a, 129a, 75 P. S. § 454).

No sanctions were imposed by Pennsylvania on the petitioner or the other carriers in 1951 for operating the overloaded equipment, other than by way of the fines imposed on the employee-drivers (129a).

It was the practice of motor carriers subject to the jurisdiction of either the Interstate Commerce Commission or the Pennsylvania Public Utility Commission to include in their books, records and reports, fines for overloaded motor vehicles in an operating expense account sub-titled "Fines for Traffic Violations", and not in a non-operating expense account covering "Penalties and Fines for Viola-

IN THE

Supreme Court of the United States

October Term, 1956

No. [redacted] 109

TANK TRUCK RENTALS, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

LEONARD SARNER,
PAUL A. WOLKIN,
208 Transportation Center Building,
Philadelphia 3, Pa.,
Counsel for Petitioner.

tions of Law, except Fines for Traffic Violations". These accounts were prescribed by the Uniform System of Accounts promulgated by the I. C. C. and adopted by the Penna. P. U. C. Operating expense items are considered, and non-operating expense items are not considered, for rate making purposes. The Interstate Commerce Commission periodically examines and reviews the books, records and reports of motor carriers subject to its jurisdiction and no change or adjustment was made by it for the year 1951 or for the years prior thereto with respect to the reporting of such fines for weight violations as an operating expense (129a-130a).

Petitioner was organized on January 1, 1945. From 1942 to the latter part of 1950, it was the policy of the Commissioner of Internal Revenue, by letter ruling dated September 10, 1942, to allow fines incurred by motor carriers for violation of the laws relating to maximum weight to be deducted as ordinary and necessary business expenses on the ground they more nearly resembled tolls, allowing the carriers the right to proceed upon the state highways without interference, than as penalties imposed as a punishment for violation of law. By special ruling dated November 30, 1950, the Commissioner reconsidered the matter and concluded that the fines were no longer deductible (Appendix to Pet. Br.).

The Tax Court concluded that although the Pennsylvania violations were widespread and common, and petitioner would have been at a competitive disadvantage in the operation of its business unless it did engage in such practices, nevertheless the Pennsylvania violations were conscious and deliberate, represented a calculated risk taken by petitioner and the other carriers, and the fines paid were criminal penalties for violation of state law. Accordingly, the Tax Court disallowed the Pennsylvania fines as deductible ordinary and necessary business expenses, since the deduction would, in the opinion of the Tax Court, have the effect of mitigating the degree of punishment and of frus-

trating the purpose and effectiveness of the Pennsylvania weight limit (131a-133a). The Court of Appeals affirmed this holding.

New Jersey.

Petitioner incurred and paid to New Jersey fines and incidental costs on seven different occasions aggregating $2,830.00 for operating overloaded vehicles on the New Jersey highways. The New Jersey limit was 60,000 pounds. In all cases known to petitioner, at no time did petitioner operate vehicles in the state of New Jersey carrying a weight in excess of the 60,000 pounds prescribed generally for the equipment in that state and this was true for the other carriers in the industry. However, the seven fines were levied under a reciprocity provision of the New Jersey law whereby motor vehicles licensed and registered in Pennsylvania, although carrying a weight less than the 60,000 pounds allowed generally, were in violation of the New Jersey weight limitation law if their weight was in excess of the 45,000 pounds, plus the 5% leeway, allowed by Pennsylvania (119a, 133a).

The interstate operation of the bulk liquid motor vehicles was a common and frequent occurrence in the industry and the widespread practice of filling the tanks to capacity, although not creating a weight in excess of the 60,000 pounds allowed generally by New Jersey law, nevertheless caused petitioner's and the industry vehicles to exceed the Pennsylvania limit on a substantial number of the New Jersey trips (116a, 126a-127a).

The Tax Court concluded that New Jersey, for reasons best known to itself, had undertaken to accommodate its penal provisions to those of Pennsylvania by the reciprocity provision, and made it a criminal offense to operate Pennsylvania vehicles on the New Jersey highways which exceeded the lower Pennsylvania limits. It reasoned that the violations were just as deliberate as the ones occurring in Pennsylvania itself, and the fines and costs were simi-

INDEX TO PETITION.

larly not deductible (133a). This likewise was the conclusion of the Court of Appeals.

Other States.

Petitioner incurred and paid in 1951 twenty-eight fines, including incidental costs, aggregating $1,294.69 in the states of Ohio, Delaware, Maryland and West Virginia. The fines pertained to overweight violations which were neither wilful nor negligent, and this was true of the industry as a whole. By the very nature of the commodity and the equipment, the exact weight could not be always controlled. Temperature changes could produce a variance in weight, residual variations in the same commodity of different refineries produced variances in weight, and a combination of a particular tractor with a particular semi-trailer could, at times, produce an axle weight violation, all of which took place despite any precautions that could fairly be demanded consistent with a practical operation of the business (119a, 122a-123a, 127a).

With respect to the violations in these states, the Tax Court adopted the reasoning of *Hoover Motor Express Co., Inc. v. U. S.*, 135 F. Supp. 818 (D. C. Tenn.) and held that even assuming that petitioner took every precaution that could fairly be demanded of a prudent motor carrier consistent with a practical operation of its business to comply with the weight limitations, nevertheless the weight laws treated the wilful and innocent violator alike, and to allow the income tax deduction for inadvertent and innocent violations would frustrate clearly defined policies of the applicable state weight statutes (134a-135a). Similarly, the Court of Appeals, relying upon the affirmance of the *Hoover Motor Express Co., Inc.* case by the Sixth Circuit (decided 1-4-57), found no justification for distinguishing between the wilful breach and the innocent mistake and concluded that the purpose of the motor vehicle laws would be frustrated just as much in the unintentional case as in the wilful transgression.

ARGUMENT.

1. The Decision Below Presents an Appropriate Occasion for This Court to Define in the Field of "Fines" the Application of the So-Called Public Policy Doctrine of Disallowance of Income Tax Deductions for Ordinary and Necessary Business Expenses.

The Internal Revenue Code itself contains no provision denying the deduction of fines as such and the rules relating to deductibility or non-deductibility have evolved administratively and judicially. Thus, for many years the Commissioner of Internal Revenue himself ruled that the exact type of fines involved in the instant case covering violations by motor vehicle carriers for exceeding the maximum weight laws of the several states were deductible as ordinary and necessary business expenses (App. 26-28). At the judicial level, *Jerry Rossman Corporation v. Commissioner*, 175 F. 2d 711 (C. A. 2) is the forerunner of a series of cases holding that the penalty paid to the Government for innocent violations of the Emergency Price Control Act of 1942 is also entitled to recognition as a legitimate income tax deduction. See *National Brass Works v. Commissioner*, 182 F. 2d 526; 205 F. 2d 104 (C. A. 9).

However, at times Courts of Appeals and the Tax Court have seemed to go so far as to conclude that fines imposed or penalties paid in connection with or to compromise violations of state or federal statutes are, ipso facto, not deductible. *Commissioner v. Longhorn Portland Cement Co.*, 148 2d 276 (C. A. 5); *Helvering v. Superior Wines & Liquors*, 134 F. 2d 373 (C. A. 8); *Burroughs Building Material Co. v. Commissioner*, 47 F. 2d 178 (C. A. 2); *Great Northern Railway Co. v. Commissioner*, 40 F. 2d 322, 372 (C. A. 8); *Bonnie Bros., Inc. v. Commissioner*, 15 B. T. A. 1231. These cases proceed on the theory that to allow fines to be deducted from the

TABLE OF CASES CITED.

wrongdoer's gross income reduces and so, in part, defeats the prescribed punishment.

This Court has never directly ruled on the point. In *Commissioner v. Heininger*, 320 U. S. 467, and *Lilly v. Commissioner*, 343 U. S. 90, this Court noted that where a taxpayer has violated a federal or state statute and incurred a fine or penalty, lower courts have not permitted him a tax deduction for its payment. No opinion was expressed whether this result should automatically follow, on the theory that the allowance of the deduction of the fine would always frustrate the sharply defined policies of the applicable federal or state statute. The Second Circuit in *Rossman* has concluded from the language of this Court in *Heininger* that such frustration would not automatically follow in every case of a fine (see discussion *infra*); other Courts of Appeals construing the same language in *Heininger* seem to indicate that it does.

The absence of more definitive guides from this Court as to the correct application of the public policy rationale promotes a tendency to sweep every type of fine and penalty into the non-deductible category. For example, the Commissioner of Internal Revenue, after ruling for many years that the fines involved herein were deductible, reversed his position in 1950 without any showing of a change in public policy calling for a different ruling (App. 29).

Public policy as the reason for tax disallowance of an expenditure must have realistic confines. No difficulty arises with the expenditure which in itself is illegal and universally condemned, as the bribe to the public official, which, if allowed income tax recognization as a deduction, would seriously interfere with the governmental enactment condemning such conduct. See *Rugel v. Commissioner*, 127 F. 2d 393 (C. A. 8); compare *Textile Mills Securities Corporation v. Commissioner*, 314 U. S. 326.

On the other hand, if the expenditure is an obligation in the nature of a fine imposed by law, further refinements

STATUTES CITED.

RULINGS OF COMMISSIONER OF INTERNAL REVENUE.

MISCELLANEOUS.

must be established by this Court for the orderly administration of the tax laws. The tax sanction of non-deductibility cannot automatically follow merely because something called a "fine" was imposed, as in the instant case, by state law. Federal tax deductions are not to be subject to the uncontrolled caprice of state legislation. The non-deductibility of the fine can only be justified by identifying it, not with some state whim, but with a sharply defined, i.e. important and rational state policy that warrants the type of social condemnation that is or ought to be implied in the concept of crime. Then the income tax deduction must clearly interfere with the enforcement provisions of this type of state statute which are designed to punish past and to defer future violations.

The Federal courts cannot abdicate, as did the court below (App. 23), this important scrutiny, and cannot accept the state designation of the word "fine" as the sole reason for income tax non-deductibility.

The tax laws are to be interpreted so as to have a uniform application throughout the states of the United States. In the factual situation similar to that presented in the instant case, one state may require a higher license fee and another state the payment of a "fine" for continued uninterrupted operation on the respective highways of motor vehicles bearing the same weight. Under the view of the court below, the payment of the former would be deductible, the latter not. Business necessity having widespread legislative acceptance would thus result in tax discrimination by means of state legislative semantics.

Accordingly, the instant case clearly presents an appropriate occasion for this Court to limit the tax disallowance of the deduction of a fine to realistic public policy levels where the fine is intended to punish and to deter socially condemned activity implicit in the concept of crime, in accordance with the pronouncements of this Court in the *Lilly* and *Heininger* cases.

2. The Decision Below is in Conflict With the Rationale of the Decisions of This Court in Commissioner v. Heininger, 320 U. S. 467 and of the Second Circuit in Jerry Rossman Corporation v. Commissioner, 175 F. 2d 711, and of the Seventh Circuit in Ross and Sullivan v. Commissioner, — F. 2d — (Decided 2-13-57).

This Court, in *Heininger*, impliedly denied what was accepted by the court below, that an obligation in the nature of a fine can never be deducted. It did so when it held that the legal expenses of an unsuccessful defense against the fine could, at times, be deducted. Thus, in interpreting this Court's decision in *Heininger*, the Second Circuit said in *Rossman* (p. 713):

> "whether the claimed deduction be of legal expenses or of fines or forfeitures, its allowance depends upon the place or sanctions in the scheme of enforcement of the underlying act. We think that . . . (this) . . . is the right reading (of *Heininger*); in short that there are 'penalties' and 'penalties' and some are deductible and some are not . . . Perhaps the deduction of a fine or forfeiture after an 'administrative finding of guilt' is more likely to 'frustrate the sharply defined policies' of a statute which imposes it, than the deduction of the legal expenses of an unsuccessful defense—though that seems questionable—but certainly there is no more ground for taking as a 'rigid criterion' the imposition of the fine than the incurrence of the expense. Each may 'frustrate the sharply defined policies' of a statute; that will depend upon how one views their deterrent effect. We hold, therefore, that in each case the question must be decided ad hoc."

The fact that the court below found no difference taxwise with the three types of fines involved in the instant case—(1) those consciously required to be incurred in Pennsylvania in order for petitioner to continue to stay in business; (2) those incurred in New Jersey which used the

IN THE

Supreme Court of the United States.

October Term, 1956.

No.

TANK TRUCK RENTALS, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

OPINIONS BELOW.

The opinion of the Tax Court (115a-136a)[1] is reported in 26 T. C. No. 52. The opinion of the Court of Appeals (App. 20-24) is reported in — F. 2d — (decided 3-6-57).

JURISDICTION.

The judgment of the Court of Appeals was entered on March 6, 1957 (App. 25). The jurisdiction of this Court rests on Section 1254 of the Judicial Code.

1. Record references are to the separate appendix to petitioner's brief in the court below.

lower Pennsylvania weight limitations for petitioner's vehicles, despite the fact the vehicles were within the weight prescribed generally by New Jersey law; and (3) those incurred in the other states where the violations admittedly were innocent and inadvertent—indicates a conviction that the denial of the deduction of any fine, regardless of its non-deterrent or punishment purposes, was required as a matter of law, in conflict with what was set forth in *Heininger*.

Similarly, the attempt by the court below to distinguish *Rossman* on the ground that the legislative history of the price statutes involved in that case indicated a distinction between a wilful breach and an innocent mistake is at best superficial, and points up the direct opposition of viewpoint of the two Circuits. It is not whether the violation from which the fine arose is wilful or innocent that is controlling. It is the role the fine plays in the scheme of enactment and enforcement of the applicable statute. *Rossman* clearly recognizes this, indicating that in each case the question must be decided ad hoc. See *A. L. I., Federal Income Tax Statute*, February 1954 Draft, Vol. I, Section x165 (i). The court below did not, placing undue reliance on *Hoover Motor Express Co., Inc. v. U. S.*, — F. 2d — (C. A. 6, decided 1-14-57), and did not concern itself, as it should, with probing into the punishment and deterrent purposes of the fine in the scheme of enforcement in the three different situations presented in the instant case.

Likewise, no real distinction exists income taxwise between an expenditure declared illegal by some state law and a fine imposed for making this very payment. The decision of the court below thus is in direct conflict with the decisions of the Seventh Circuit in the *Ross* and *Sullivan* cases. There the Seventh Circuit held that salaries and rent paid in direct violation of a state statute penalizing such payments by the proprietor of an illegal bookmaking establishment must be considered an integral part of the illegal business and as such deductible. See *Commissioner*

QUESTIONS PRESENTED.

I. Whether sums paid by petitioner, a bulk liquid motor carrier, pursuant to union contracts with its truck drivers to indemnify them against fines imposed on the drivers for operating on the Pennsylvania highways motor vehicles which exceeded the Pennsylvania weight laws, were deductible as ordinary and necessary business expenses where:

a. Pennsylvania had lower weight limits than the surrounding states through which petitioner operated;

b. petitioner's standard size vehicles, when fully loaded with liquids other than gasoline, were necessarily always in excess of the Pennsylvania legal limit and subject to fines although they carried a weight permissible in the other states;

c. petitioner had to carry full loads to stay in business; and

d. the fines were required by Pennsylvania law to be used for road and highway maintenance and repair?

II. Were similar fines imposed by the states of New Jersey, Maryland, Ohio, West Virginia, and Delaware directly on the carrier so deductible where:

a. New Jersey, although having a weight limitation considerably higher than that of Pennsylvania, had a reciprocity provision whereby a vehicle registered in Pennsylvania had to comply with the stricter Pennsylvania limits, causing petitioner's Pennsylvania registered vehicles operating in New Jersey to be subject to New Jersey fines when their weight exceeded the lower Pennsylvania limit, even though the weight was under the limit otherwise permissible by New Jersey law; and

b. the weight laws of the other states were sufficient to assure maximum utilization of the standard size equipment and any operation of overloaded vehicles subject to fine was innocent, inadvertent and without petitioner's knowledge at the time of the trip?

STATUTE INVOLVED.

INTERNAL REVENUE CODE OF 1939:

Sec. 23—Deductions from Gross Income.

In computing net income there shall be allowed as deductions:

(a) Expenses.

(1) Trade or business expenses.

(A) In General. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *

STATEMENT.

This case involves the income tax liability of Tank Truck Rentals, Inc. for the calendar year 1951. The statutory notice of deficiency was dated August 12, 1953. The petition for redetermination was filed in the Tax Court on October 19, 1953 (1a).

The facts found by the Tax Court material to the questions presented are substantially as follows (115a-130a).

General History.

Petitioner was part of the industry engaged in the business of transporting bulk liquids by motor vehicles. Petitioner had no operating certificates of its own issued by the Interstate Commerce Commission or the State Public Utility Commissions, but, as a lessor, leased its motor vehicles and furnished the driver as its own employee to motor carriers holding such certificates, who also owned and operated large fleets of their own (115a).

Petitioner and its industry witnesses, hereinafter sometimes referred to as the industry, represented carriers who transported a substantial portion of the bulk liquids carried over-the-road by all motor carriers in the states of Pennsylvania, New Jersey, Ohio, Maryland, Delaware and West Virginia during the taxable year. Over-the-road means

transportation between towns and cities, but not solely within a municipality. Petitioner and the industry operated inter and intra-state (115a-116a).

Each of the states involved prescribed a maximum weight for motor vehicles using its public highways. Pennsylvania had lower weight limits than the other states. The Pennsylvania limit in 1951 was 45,000 pounds, plus a 5% leeway, or a total of 47,250 pounds. This limit had remained unchanged from as far back as 1943 until it was increased by legislation in 1955. The other states, by 1951, prescribed generally a maximum weight of 60,000 pounds (117a-118a).

Substantially the same equipment was used and operated in the industry generally throughout the states. It consisted of truck tractor and semi-trailer combinations. The bulk of the industry's semi-trailer fleets contained tanks with a capacity ranging from 4,500 to 5,000 gallons. Petitioner was formed in 1945 and during World War II only single compartment tanks within the 4,500 to 5,000 gallon range were available for purchase. This was due to restrictions relating to the conservation of steel, and the attempt to have a uniform standardized size of tank for maximum utility which would comply generally with the weight restrictions in most of the states in the United States (116a-117a, 123a).

The weights of the bulk liquids commonly carried varied from 6 pounds per gallon for gasoline to 8 pounds per gallon for Bunker "C" oil. The equipment was standardized in weight ranging between 20,000 pounds and 22,000 pounds, unloaded. Thus this equipment, when fully loaded with any liquid other than gasoline, was always in excess of the legal limit in Pennsylvania, but generally within the maximum prescribed by the other states whose weight limits assured capacity use of the standard equipment (117a, 120a, 124a, 131a).

Pennsylvania.

It was the common, widespread and long established practice in the industry in Pennsylvania and in the other states to fill the semi-trailer tanks to capacity (118a). Only by operating maximum loads were petitioner and the other carriers able to remain in business. The rate structure in the industry was predicated upon the carriage of 4,500 gallons (47,000 to 58,000 pounds) per trip and petitioner's rental for its equipment and driver was based on a percentage of the tariff received from the customer by its lessee-certificated carriers in the industry. Discontinuance of the practice of filling to capacity would have reduced petitioner's operating revenue per gallon hauled, while operating costs would have increased because of the additional number of trips required, thus causing petitioner to operate at a loss and go out of business. An increase in petitioner's rentals, to compensate for the reduced pay load per trip would have referred the business to the other carriers. Petitioner chose to remain in business and conform to the industry's practice of overloading (37a-38a, 124a-125a).

Aside from the revenue factor, it was not feasible for petitioner or the industry to load the tanks partially in order to conform to the Pennsylvania weight requirements. This would have created a hazard to the safety of operation for the reason that the surge created in the partially filled tank causes difficulty in stopping the motor vehicle and in negotiating curves along the highways (125a).

Acquisition of smaller equipment, although it would have avoided the hazard to public safety of the partially filled tank, would have been just as uneconomical as carrying partial loads. Moreover, in determining industry policy with respect to the size of equipment to be used in Pennsylvania, one of the factors which necessarily had to be considered was the legislation which was proposed from the time of petitioner's formation in 1945 in each successive

session of the Pennsylvania Legislature to increase the weight requirement to conform to that of the neighboring states, which, if enacted as it finally was in 1955, would have rendered the fleet of smaller equipment entirely obsolete (11a, 41a, 125a-126a, 130a, 75 P. S. § 453 (pocket part)).

In addition, although approximately 100% of Petitioner's operations had some contact with the state of Pennsylvania—the transportation taking place either wholly within Pennsylvania or Pennsylvania being the destination or originating state on interstate shipments—nevertheless petitioner was engaged in a substantial amount of interstate business, as were all the other carriers in the industry. It was essential that the equipment owned and operated by petitioner and the other carriers be suitable economically in the neighboring states where they operated, which allowed the larger standardized equipment to be fully utilized. Semi-trailer tanks with a capacity small enough to be fully utilized for purposes of the Pennsylvania weight requirements were virtually worthless to petitioner and the other carriers in their operations in any state other than Pennsylvania (126a).

Furthermore, in Pennsylvania an increase in rates by the industry as a whole to compensate for the loss in revenue per trip for the operation of the smaller equipment would have referred the business to the railroads and to the motor vehicle fleet privately owned and operated by the refineries, the main customers of the over-the-road bulk liquid carriers. In the neighboring states such an increase would have referred the business to competing carriers avoiding Pennsylvania in their operations. Accordingly, petitioner and the other carriers decided to utilize fully their standard equipment in Pennsylvania as well as in the other states, rather than abdicate the business (125a-126a).

Although the Pennsylvania statute contained a provision for granting a one-trip particular load permit to exceed the legal limit for each overweight vehicle, upon

payment of a fee, this procedure did not offer a practical solution to the dilemma in which petitioner and the other carriers found themselves. The fees were not insubstantial and the procedure was cumbersome, with resultant delay to both the shipper and the consignee. This was especially true on interstate operation, when a vehicle was overweight in Pennsylvania as a result of a continuous trip. Moreover, it was doubtful if the permit would have been granted, since it was the policy of the Pennsylvania authorities not to issue the permit where the overweight could be avoided by not filling the tank to capacity. Hence, it was the industry practice, followed by petitioner, not to seek the permit and instead to take the risk of incurring a fine (43a-44a, 126a, 131a, 75 P. S. § 455).

As a consequence of the uniform practice to fill the tanks to capacity and operate equipment exceeding the maximum gross weight allowed by Pennsylvania law, the vehicles of petitioner and the other bulk liquid carriers were frequently stopped by the police in 1951 and fined the statutory amount, plus incidental costs, of $25.00 for a vehicle not exceeding 10% of the maximum weight, and $50.00 for a violation over 10%. Petitioner's vehicles were stopped and fined 711 times. The fines imposed amounted to $36,836.15, including costs. Petitioner's vehicles and those of the other carriers were overweight in Pennsylvania a substantial number of times in excess of the number of times they were stopped and fined (119a-120a, 126a-127a).

Pennsylvania Public Policy.

By Pennsylvania law, the fines were imposed on the employee-driver of the overweight vehicles, and not, as was the case with the other states, on the carrier-owner. Under union negotiated contracts with its employee-drivers, petitioner was obligated to indemnify the drivers and consequently, did pay the fines for the overweight vehicles. The other carriers did likewise (14a-16a, 128a).

v. Doyle, 231 F. 2d 635 (C. A. 7). It is unquestionable that nothing could have been more integral to the petitioner's perfectly legal and legitimate business than to have filled its tanks to capacity with bulk liquid, thus causing its vehicles to be overweight in Pennsylvania and subject to fines on approximately 60% to 75% of its trips. The Tax Court found what the court below accepted, that unless petitioner conformed to this widespread industry practice, it would have been unable to operate in Pennsylvania, would have been prevented from any interstate operations through the neighboring states which recognized the higher weight limits generally prevailing, and would have been forced to go out of business.

If the taxpayers in the *Ross* and *Sullivan* cases properly could deduct the illegal payments of rent and salaries, there is no reason why they could not have deducted a fine imposed for making those payments. However, under the decision of the court below, they would not have been so allowed. This is indeed a peculiar twist. Although gambling itself may be socially condemned and a fine imposed to prevent and punish such activity justifiably may be refused tax deduction, the Seventh Circuit quite properly held that the rent and salary aspects of such an illegal business, recognized as legitimate in most states but treated as unlawful in Illinois where the case arose, cannot be further punished by refusal to recognize the expenditure as an ordinary and necessary business expense, where the income itself admittedly was subject to tax.

So also, in the instant case, the fines in Pennsylvania were imposed on weights recognized as legitimate in all the neighboring states. They were imposed not to punish past nor to deter future overweight violations, since continued operation of the overweight vehicles was completely and freely allowed merely upon payment of the fine. The fines were by statute allocated to road and highway maintenance and repair. See *A. L. I. Federal Income Tax Statute*, February 1954 Draft, ~~Vol.~~ I, Section x165(i)(2), which

proposes that fines or penalties imposed primarily for compensatory damage are deductible. Both the conscious and inadvertent overweight operations were absolutely vital to the continued business existence of the petitioner and the other carriers in the industry, so long as Pennsylvania, prior to 1955, saw fit to maintain lower weight limits than that permissible in all the neighboring states through which petitioner and the industry operated. Hence, the fine was nothing more than a disguised toll for the use of the highways.

That this position is not a novel one is evident from the fact that from 1942 to the latter part of 1950, the Commissioner of Internal Rveenue, by letter ruling, allowed the fines incurred for such overweight violations to be deducted as ordinary and necessary business expenses (Appendix 26-28). No sharply defined state policies were then thought to be frustrated, for the Commissioner took the view that although the payments were designated as fines in the respective statutes, they more nearly resembled tolls, allowing the carrier the right to proceed upon the highways of the state without interference, than as penalties imposed for violations of law. Thus, the place of the fine, especially in the Pennsylvania weight law, being imposed on the employee-driver, and the studied enforcement policy adopted by the Pennsylvania authorities to recognize the discriminatory position the bulk liquid industry found itself in by allowing the vehicles to continue overloaded without requiring that the excess load be removed, indicate that the factual premise upon which the Commissioner's earlier deductible ruling was based continued to be present in Pennsylvania in the taxable year.

Accordingly, the court below misunderstood and improperly applied the pronouncements of this Court in *Heininger* and created by its decision serious conflict with the *Rossman* and with the *Ross* and *Sullivan* decisions.

CONCLUSION.

The decision below is incorrect. There is conflict with the pronouncements of this Court in *Heininger*, and with the decisions of the Courts of Appeals of other Circuits. The occasion is appropriately presented for the first time for this Court to define the realistic confines of the application to fines of the public policy doctrine denying tax deduction to ordinary and necessary business expenses, in order to aid in the proper administration of the revenue laws. The petition for writ of certiorari should, therefore, be granted.

Respectfully submitted,

LEONARD SARNER,
PAUL A. WOLKIN,
Counsel for Petitioner.

Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,060

TANK TRUCK RENTALS, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES.

Argued January 25, 1957

Before BIGGS, *Chief Judge*, and MCLAUGHLIN and HASTIE, *Circuit Judges.*

Opinion of the Court.

(Filed March 6, 1957)

By MCLAUGHLIN, *Circuit Judge.*

Petitioner during the year 1951 was a motor carrier transporting bulk liquids. It supplied vehicles and driver-operators to various "over-the-road" carriers holding operating certificates from the Interstate Commerce Commission. During 1951, it paid fines totalling $37,965.00 imposed

on its drivers for operating on the highways motor vehicles in violation of state statutes limiting weights of motor vehicles.[1] Most of the fines were paid in Pennsylvania which had a particularly low maximum weight law at that time.[2] The New Jersey fines sought to enforce the Pennsylvania maximum weight provision through reciprocity provisions of the New Jersey statute. The fines paid in states other than Pennsylvania and New Jersey resulted from unintentional overloading.

As a matter of economic policy petitioner deemed it expedient to overload and run the risk of an occasional fine. The Tax Court found that it had been the general practice of the trucking industry to overload in Pennsylvania and chance the fines with the result that petitioner would have

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1 The following table shows, with respect to the taxable year involved the number and dollar amounts of fines and costs paid by taxpayer to each of the states involved:

State	Number of Fines	Dollar Amt of Fines	Dollar Amt of Costs	Total
Pennsylvania				
at $50. each	649	$32,450.00	$2,709.40	$35,159.40
at $25. each	62	1,550.00	226.75	1,776.75
New Jersey	7	2,800.00	30.00	2,830.00
Maryland	7	410.00	29.91	439.91
Ohio	9	405.00	51.10	456.10
West Virginia	10	320.00	39.68	359.68
Delaware	2	30.00	9.00	39.00
	746	$37,965.00	$3,095.84	$41,060.84

2 The statutory maximum gross weight for the truck tractor and semi-trailer combination owned, used and operated by taxpayer was, for each of these states in 1951, as follows:

State	Statutory Citation	Maximum Gross Weight
Pennsylvania	75 P.S. § 453(g)	45,000 lbs.
New Jersey	N.J.S.A. § 39:3-84	60,000 lbs.
Ohio	Page's Ohio Gen. Code Anno. § 7246	Statutory formula which results in range from 57,000 to 67,600 lbs.
Delaware	Del. Code Anno. Title 21, Chapter 45 § 4503	48,000 lbs. for single axle trailers; 60,000 lbs. for tandem axle trailers
West Virginia	1951 Supp. to West Va. Code of 1949 Anno. § 1721 (463)	Statutory formula which results in range from 54,000 to 60,800 lbs.
Maryland	Flack's 1951 Anno. Code of Maryland § 278, Art. 66½	Statutory formula which results in gross weight of 65,000 lbs.

been at a competitive disadvantage if it had attempted to conform to the law. In 1955, the Pennsylvania maximum load limits were raised substantially.[3]

The rule that certain expenditures otherwise ordinary and necessary under Section 23(a)(1)(A) of the Internal Revenue Code of 1939 are not deductible if their allowance would frustrate sharply defined national and state policies is of judicial origin. Commissioner v. Heininger, 320 U. S. 467 (1943).

In Hoover Motor Express Co. v. United States, 135 F. Supp. 818 (D.C.M.D. Tenn. 1955), affirmed January 4, 1956, 6 Cir., F.2d ; the District Court made an exhaustive examination of the pertinent case law and held overloading fines were not deductible by a motor carrier. Petitioner seeks to distinguish the Hoover opinion on the grounds that: (1) there was a greater disparity in the Pennsylvania weight limitation and those of the adjoining states; (2) the economic factors are more compelling in this instance; and (3) the Pennsylvania enforcement policy was sporadic or discriminatory. These broad allegations add nothing substantial to petitioner's wholly untenable theory. Under it the federal court on a tax controversy would be required to examine not only the merits of particular criminal cases in the state courts, but indeed the wisdom of a state motor vehicle statute and the regularity of its enforcement. State legislatures are the determinative tribunals in those areas. Once it is concluded that the regulation is within the sphere of proper legislative action the courts will not gainsay the legislature on just where the arbitrary line between allowable and proscribed weights should be drawn. Nor is it appropriate at this juncture to review state enforcement policies. Such must be the rule if there is to be any semblance of order on this and similar questions. The weight limit law is not to be considered a mere revenue measure, as petitioner suggests, simply because

3 Act #70 of June 30, 1955, amended the Pennsylvania Vehicle Code, 75 P. S. §§ 453, 454.

the fines collected are assigned to road repair. It has been held by this court that the disputed law is for the protection of the citizenry of Pennsylvania as well as the public roads. See McDonald v. Pennsylvania R. Co., 210 F.2d 524 (3 Cir. 1954) involving a death claim arising in part from disregarding this statute regulating overweight vehicles.

Petitioner seeks to support its theory by Jerry Rossman Corporation v. Commissioner, 175 F.2d 711 (2 Cir. 1949), which allowed deductions of overcharges paid over to the government under the Emergency Price Control Act of 1942. See also National Brass Works v. Commissioner, 182 F.2d 526 (9 Cir. 1950); and National Brass Works v. Commissioner, 205 F.2d 104 (9 Cir. 1953). Those decisions turn on the legislative history of the price control statutes which indicated a distinction between wilful breach and innocent mistake. That distinction does not exist in the governing motor vehicle law now before us, and even if it did petitioner's offenses in Pennsylvania and New Jersey were admittedly wilful. The transgressions in other states, though unintentional, were in disregard of the local laws. Further, the O.P.A. cases rely on the unusually complex regulatory scheme in the price control law, which problem does not confront a motor carrier with respect to weight limit restrictions. The O.P.A. penalty required merely that the unlawful income be paid over to the government. That purpose was not frustrated in a non-wilful case by relieving the taxpayer of the tax burden on the income so disgorged. As Judge Learned Hand wrote in Rossman (p. 713), "We think * * * in short that there are 'penalties' and 'penalties', and that some are deductible and some are not".

We hold it clear that the state statutes involved are as said in Commissioner v. Heininger, supra, the creation of "sharply defined state * * * policies"; that they are "state policies evidenced by some governmental declaration of them". Lilly v. Commissioner, 343 U.S. 90, 97 (1951). The Court that fashioned those phrases could not have had in mind a more typical example than motor vehicle laws.

The decision of the Tax Court will be affirmed.

Judgment of the Court Below.

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by Counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF,
Clerk.

March 6, 1957.

Text of a Letter Dated September 10, 1942, and Signed by Guy T. Helvering, Commissioner (Symbols, IT:P:2—WTL): (1950 CCH—Stand. Fed. Tax Rep. Vol. 5, ¶ 6134).

Reference is made to your letter of July 29, 1942, requesting advice with respect to the deductibility, for Federal income tax purposes, of "fines" incurred and paid to a State by motor carriers for violation of laws relating to maximum weights and lengths of trucks, consisting of a tractor and semi-trailer operating upon the highways of such State.

The pertinent facts are that the various States have their own laws as to maximum weights and lengths which vary considerably. Under the laws of the State of New York a tractor semi-trailer is allowed to carry 50,800 pounds while under the laws of the State of Tennessee the same equipment is allowed to carry only 30,000 pounds. The following example is set forth in your letter:

> Let us consider a hypothetical case where an operator has two units, each consisting of a tractor and semi-trailer; each unit having an unladen weight of 15,000 pounds. Should the carrier receive cargo weighing 60,000 pounds in State A where the weight limits allow 50,800 pounds, he could place on the one unit 35,800 pounds of cargo, which with the empty vehicle would make a gross weight of 50,800. The other unit could be loaded with 24,200 pounds, which with the empty vehicle would make a gross weight of 39,200 pounds, and be under the weight limits for State A. Should this cargo have to travel through State B with a weight limitation of 45,000 pounds through State C, with a weight limitation of 40,000 pounds to State D, with a weight limitation of 30,000 pounds, there would be two courses open to the carrier. One would be to secure permits for the particular unit which might be over-

weight in accordance with the State law, if such State issued permits. The other would be to load his cargo and take a chance on going through the States and paying a "fine" if caught, as the "fines" in most cases would be about the same as the cost for a permit. In our hypothetical case the heavier of the two units would be overweight in all States except the originating State and lighter of the two could pass through all States except E, the destination point.

You state that the matter of securing permits often forces the operator to take the chance on paying "fines", as it would probably require at least three or four days for a Maryland operator to secure permits in the States referred to above, and this delay might result in several contingencies, such as spoiling of perishable goods or loss of the cargo because of the urgency and need for speed. Should the operator decide on delaying the cargo and abide by all the laws, he could list the cost of permits as ordinary business expense and deduct it in his income tax return, but should he, as a matter of business, to prevent loss and satisfy the shipper and consignee, take his chances with "fines", he would not be permitted to deduct them in his income tax return. The "fines" in the majority of cases are for revenue and no attempt is made to have the excess load removed, which would place the "fines" in the same category as the amount paid for permits.

Amounts paid as penalties for violation of State statutes have been held to be non-deductible for Federal income tax purposes either on the ground that such expenditures were avoidable and therefore are not a necessary incident to the operation of a business or because, on grounds of public policy they ought not to receive any sanction. (See *Burroughs Building Material Company v. Commissioner*, 18 B. T. A. 101, affirmed 47 Fed. (2d) 178, Ct. D. 297, C. B. X-1, 397 (1931) and *Great Northern Railway Company v. Commissioner*, 40 Fed. (2d) 372; see also G. C. M. 11358,

C. B. XII-1, 29 (1953) in which it is held that penalty payments in connection with income taxes, whether on account of negligence, delinquency, or fraud are not deductible from gross income. However, as indicated in the *Burroughs Building Material Company* decision, *supra*, expenditures which are in themselves immoral, such as for bribery of public officials to secure protection of an unlawful business, would not have to be allowed in order consistently to justify a deduction of "fines" paid for violations of law involving no moral turpitude and practically inevitable. The court stated in that decision, in referring to the *Great Northern Railway Company* case, *supra*, that "fines" for violations of regulations, which are inevitable in any large railroad system may, for that reason, reasonably be allowed as "ordinary and necessary" expenses of the business.

Although the amounts paid by the motor carriers are designated as "fines" in the statutes and regulations of the several States, they more nearly resemble a toll allowing the carriers the right to proceed upon the highways of such States without interference than as penalties imposed as a punishment for violations of law. The payment of such "fines" are shown by the facts to be a necessary incident to the operation of the business of such carriers.

It is the opinion of this office that the "fines" incurred and paid by the motor carriers under the circumstances stated above constitute "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business" within the meaning of section 23(a) of the Internal Revenue Code and are allowable business expense deductions.

Special Ruling Dated November 30, 1950 (1951-1 C. B. p. 15).

Reconsideration has been given to the conclusion heretofore reached by the Bureau that fines paid by truck operators for violations of State laws prescribing maximum weights, loads, and sizes of vehicles are deductible from gross income as ordinary and necessary business expenses under Section 23(a)(1)(A) of the Internal Revenue Code.

That conclusion was based upon the understanding that the fines in question were paid in lieu of fees which would have been payable for permits to operate overloaded or overlength vehicles, and that such permits were generally granted by the State highway authorities. The fines were, therefore, regarded as more in the nature of tolls than penalties.

Upon reconsideration of the question involved it appears that the premise on which the Bureau's conclusion was based was erroneous. It is therefore held that fines paid by truck operators for violations of State laws prescribing maximum weights, loads, and sizes of vehicles are penalties which are not deductible as ordinary and necessary business expenses under section 23(a)(1)(A) of the Internal Revenue Code. (See *Burroughs Building Material Co. v. Commissioner*, 47 Fed. (2d) 178, Ct. D. 297, C. B. X-1, 397 (1931), and G. C. M. 11358, C. B. XII-1, 29 (1933)).

Pursuant to authority contained in section 3791(b) of the Code, the instant ruling will not be applied to fines incurred or paid prior to December 1, 1950.

IN THE

Supreme Court of the United States

October Term, 1957.

No. 109.

TANK TRUCK RENTALS, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Brief for the Petitioner.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1957.

No. 109.

TANK TRUCK RENTALS, INC.,
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinion of the Tax Court of the United States (R. 115a-136a) is reported in 26 T. C. 427 (1956). The opinion of the United States Court of Appeals for the Third Circuit (R. 138-141) is reported in 242 F. 2d 14.

JURISDICTION.

The judgment of the United States Court of Appeals was entered on March 6, 1957 (R. 142). The petition for a writ of certiorari was filed on April 22, 1957 and was granted on June 17, 1957 (R. 143). The jurisdiction of this Court rests on 28 U. S. C. Section 1254.

QUESTIONS PRESENTED.

I. Whether sums paid by petitioner, a bulk liquid motor carrier, pursuant to union contracts with its truck drivers to indemnify them against fines imposed on the drivers for operating on the Pennsylvania highways motor vehicles which exceeded the Pennsylvania weight law, were deductible as ordinary and necessary business expenses where:

a. Pennsylvania had lower weight limits than the surrounding states through which petitioner operated;

b. petitioner's standard size vehicles, when fully loaded with liquids other than gasoline, were necessarily always in excess of the Pennsylvania legal limit and subject to fines although they carried a weight permissible in the other states;

c. petitioner had to carry full loads to stay in business; and

d. the fines were required by Pennsylvania law to be used for road and highway maintenance and repair?

II. Were similar fines imposed by the states of New Jersey, Maryland, Ohio, West Virginia, and Delaware directly on the carrier so deductible where:

a. New Jersey, although having a weight limitation considerably higher than that of Pennsylvania, had a reciprocity provision whereby a vehicle registered in Pennsylvania had to comply with the stricter Pennsylvania limit, causing petitioner's Pennsylvania registered vehicles operating in New Jersey to be subject to New Jersey fines when their weight exceeded the lower Pennsylvania limit, even though the weight was under the limit otherwise permissible by New Jersey law; and

b. the weight laws of the other states were sufficient to assure maximum utilization of the standard size equipment and any operation of overloaded vehicles subject to fine was innocent, inadvertent and without petitioner's knowledge at the time of the trip?

STATUTES AND REGULATIONS INVOLVED.

Internal Revenue Code of 1939:

Sec. 23. Deductions from Gross Income.

In computing net income there shall be allowed as deductions:

(a) [as amended by Sec. 121 (a), Revenue Act of 1942, c. 619, 56 Stat. 798, 819]. Expenses.—

(1) Trade or business expenses.—

(A) In general.—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 23 (a).)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

Sec. 29.21-1. Meaning of Net Income.—* * * The normal taxes and surtaxes imposed on individuals and on corporations are computed upon net income less certain credits. Although taxable net income is a statutory conception, it follows, subject to certain modifications as to exemptions and as to deductions for partial losses in some cases, the lines of commercial usage. Subject to these modifications statutory net income is commercial net income * * *

Sec. 29.23(a)-1. Business Expenses.—Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except the classes of items which are deductible under sections 23(b) to 23(z), inclusive, and the regulations thereunder. * * *

The pertinent provisions of Sections 719, 903, 904, 905, and 1207 of the Vehicle Code of Pennsylvania, Act of May 1, 1929, P. L. 905, as amended, and of Act No. 70, approved and effective June 30, 1955, amending, inter alia, Sections 903 and 904 of the Vehicle Code of Pennsylvania, are set forth in the Appendix, *infra*.

STATEMENT.

This case involves the income tax liability of Tank Truck Rentals, Inc. for the calendar year 1951. The facts found by the Tax Court material to the questions presented are substantially as follows (R. 115a-130a).

General History.

Petitioner was part of the industry engaged in the business of transporting bulk liquids by motor vehicles. Petitioner had no operating certificates of its own issued by the Interstate Commerce Commission or the State Public Utility Commissions, but, as a lessor, leased its motor vehicles and furnished the driver as its own employee to motor carriers holding such certificates, who also owned and operated large fleets of their own (R. 115a).

Petitioner and its industry witnesses, hereinafter sometimes referred to as the industry, represented carriers who transported a substantial portion of the bulk liquids carried over-the-road by all motor carriers in the states of Pennsylvania, New Jersey, Ohio, Maryland, Delaware and West Virginia during the taxable year. Over-the-road means transportation between towns and cities, but not solely within a municipality. Petitioner and the industry operated inter- and intra-state (R. 115a-116a).

Each of the states involved prescribed a maximum weight for motor vehicles using its public highways. Pennsylvania had lower weight limits than the other states. The Pennsylvania limit in 1951 was 45,000 pounds, plus a 5% leeway, or a total of 47,250 pounds. This limit had remained unchanged from as far back as 1943 until it was increased by legislation in 1955. The other states, by 1951, prescribed generally a maximum weight of 60,000 pounds (R. 117a-118a).

Substantially the same equipment was used and operated in the industry generally throughout the states. It consisted of truck tractor and semi-trailer combinations.

The bulk of the industry's semi-trailer fleets contained tanks with a capacity ranging from 4,500 to 5,000 gallons. Petitioner was formed in 1945 and during World War II only single compartment tanks within the 4,500 to 5,000 gallon range were available for purchase. This was due to restrictions relating to the conservation of steel, and the attempt to have a uniform standardized size of tank for maximum utility which would comply generally with the weight restrictions in most of the states in the United States (R. 116a-117a, 123a).

The weights of the bulk liquids commonly carried varied from 6 pounds per gallon for gasoline to 8 pounds per gallon for Bunker "C" oil. The equipment was standardized in weight ranging between 20,000 pounds and 22,000 pounds, unloaded. Thus this equipment, when fully loaded with any liquid other than gasoline, was always in excess of the legal limit in Pennsylvania, but generally within the maximum prescribed by the other states whose weight limits assured capacity use of the standard equipment (R. 117a, 120a, 124a, 131a).

It was the common, widespread and long established practice in the industry in Pennsylvania and in the other states to fill the semi-trailer tanks to capacity (118a). Only by operating maximum loads were petitioner and the other carriers able to remain in business. The rate structure in the industry was predicated upon the carriage of 4,500 gallons (47,000 to 58,000 pounds) per trip and petitioner's rental for its equipment and driver was based on a percentage of the tariff received from the customer by its lessee-certificated carriers in the industry. Discontinuance of the practice of filling to capacity would have reduced petitioner's operating revenue per gallon hauled, while operating costs would have increased because of the additional number of trips required, thus causing petitioner to operate at a loss and go out of business. An increase in petitioner's rentals, to compensate for the reduced pay load

per trip would have referred the business to the other carriers. Petitioner chose to remain in business and conform to the industry's practice of overloading (R. 37a-38a, 124a-125a).

Aside from the revenue factor, it was not feasible for petitioner or the industry to load the tanks partially in order to conform to the Pennsylvania weight requirements. This would have created a hazard to the safety of operation for the reason that the surge created in the partially filled tank causes difficulty in stopping the motor vehicle and in negotiating curves along the highways (R. 125a).

Acquisition of smaller equipment, although it would have avoided the hazard to public safety of the partially filled tank, would have been just as uneconomical as carrying partial loads. Moreover, in determining industry policy with respect to the size of equipment to be used in Pennsylvania, one of the factors which necessarily had to be considered was the legislation which was proposed from the time of petitioner's formation in 1945 in each successive session of the Pennsylvania Legislature to increase the weight requirement to conform to that of the neighboring states, which if enacted as it finally was in 1955, would have rendered the fleet of smaller equipment entirely obsolete (R. 11a, 41a, 125a-126a, 130a, 75 Pa. Purdon Stat. § 453 (pocket part)).

In addition, although approximately 100% of Petitioner's operations had some contact with the state of Pennsylvania—the transportation taking place either wholly within Pennsylvania or Pennsylvania being the destination or originating state on interstate shipments—nevertheless petitioner was engaged in a substantial amount of interstate business, as were all the other carriers in the industry. It was essential that the equipment owned and operated by petitioner and the other carriers be suitable economically in the neighboring states where they operated which allowed the larger standardized equipment to

be fully utilized. Semi-trailer tanks with a capacity small enough to be fully utilized for purposes of the Pennsylvania weight requirements were virtually worthless to petitioner and the other carriers in their operations in any state other than Pennsylvania (R. 126a).

Furthermore, in Pennsylvania an increase in rates by the industry as a whole to compensate for the loss in revenue per trip for the operation of the smaller equipment would have referred the business to the railroads and to the motor vehicle fleet privately owned and operated by the refineries, the main customers of the over-the-road bulk liquid carriers. In the neighboring states such an increase would have referred the business to competing carriers avoiding Pennsylvania in their operations. Accordingly, petitioner and the other carriers decided to utilize fully their standard equipment in Pennsylvania as well as in the other states, rather than abdicate the business (R. 125a-126a).

Although the Pennsylvania statute contained a provision for granting a one-trip particular load permit to exceed the legal limit for each overweight vehicle, upon payment of a fee, this procedure did not offer a practical solution to the dilemma in which petitioner and the other carriers found themselves. The fees were not insubstantial and the procedure was cumbersome, with resultant delay to both the shipper and the consignee. This was especially true on interstate operation, when a vehicle was overweight in Pennsylvania as a result of a continuous trip. Moreover, it was doubtful if the permit would have been granted, since it was the policy of the Pennsylvania authorities not to issue the permit where the overweight could be avoided by not filling the tank to capacity. Hence, it was the industry practice, followed by petitioner, not to seek the permit and instead to take the risk of incurring a fine (R. 43a-44a, 126a, 131a, 75 Pa. Purdon Stat. § 455).

As a consequence of the uniform practice to fill the tanks to capacity and operate equipment exceeding the

maximum gross weight allowed by Pennsylvania law, the vehicles of petitioner and the other bulk liquid carriers were frequently stopped by the police in 1951 and fined the statutory amount, plus incidental costs, of $25.00 for a vehicle not exceeding 10% of the maximum weight, and $50.00 for a violation over 10%. Petitioner's vehicles were stopped and fined 711 times. The fines imposed amounted to $36,836.15, including costs. Petitioner's vehicles and those of the other carriers were overweight in Pennsylvania a substantial number of times in excess of the number of times they were stopped and fined (R. 119a-120a, 126a-127a).

Pennsylvania Public Policy.

By Pennsylvania law, the fines were imposed on the employee-driver of the overweight vehicles, and not, as was the case with the other states, on the carrier-owner. Under union negotiated contracts with its employee-drivers, petitioner was obligated to indemnify the drivers and consequently, did pay the fines for the overweight vehicles. The other carriers did likewise (R. 14a-16a, 128a).

Under the Pennsylvania statute the fines for operating overloaded vehicles within local municipalities were required to be paid to and used by such local municipality for the construction, repair and maintenance of its highways (R. 132a, 75 Pa. Purdon Stat. § 737).

Imprisonment of the driver of a Pennsylvania overweight vehicle was provided for only upon default in payment of the fine. None of the petitioner's drivers was ever imprisoned, had his license suspended or was subjected by the Pennsylvania authorities charged with enforcing the overweight provision to any sanction other than the fine, and this was true for the employee-drivers of the other carriers (R. 128a, 75 Pa. Purdon Stat. § 453).

During the years of World War II and up to the latter part of 1950, petitioner's overweight vehicles were not

stopped and fined by the Pennsylvania enforcement authorities (R. 129a).

The Pennsylvania statute provided for removal of the excess load in the discretion of the enforcement authorities before the overweight vehicle could continue enroute, but neither the petitioner nor the other carriers was ever required to remove any excess load before its overweight vehicle was permitted to continue on the Pennsylvania highways. In some instances the other states did enforce a similar type removal provision (R. 44a-45a, 82a, 129a, 75 Pa. Purdon Stat. § 454).

No sanctions were imposed by Pennsylvania on the petitioner or the other carriers in 1951 for operating the overloaded equipment, other than by way of the fines imposed on the employee-drivers (R. 129a).

It was the practice of motor carriers subject to the jurisdiction of either the Interstate Commerce Commission or the Pennsylvania Public Utility Commission to include in their books, records and reports, fines for overloaded motor vehicles in an operating expense account sub-titled "Fines for Traffic Violations", and not in a non-operating expense account covering "Penalties and Fines for Violations of Law, except Fines for Traffic Violations". These accounts were prescribed by the Uniform System of Accounts promulgated by the I. C. C. and adopted by the Penna. P. U. C. Operating expense items are considered, and non-operating expense items are not considered, for rate making purposes. The Interstate Commerce Commission periodically examines and reviews the books, records and reports of motor carriers subject to its jurisdiction and no change or adjustment was made by it for the year 1951 or for the years prior thereto with respect to the reporting of such fines for weight violations as an operating expense (R. 129a-130a).

Petitioner was organized on January 1, 1945. From 1942 to the latter part of 1950, it was the policy of the

Commissioner of Internal Revenue, by letter ruling dated September 10, 1942, to allow fines incurred by motor carriers for violation of the laws relating to maximum weight to be deducted as ordinary and necessary business expenses on the ground they more nearly resembled tolls, allowing the carriers the right to proceed upon the state highways without interference, than as penalties imposed as a punishment for violation of law. By special ruling dated November 30, 1950, the Commissioner reconsidered the matter and concluded that the fines were no longer deductible (Appendix, 9a-12a).

The Tax Court concluded that although the Pennsylvania violations were widespread and common, and petitioner would have been at a competitive disadvantage in the operation of its business unless it did engage in such practices, nevertheless the Pennsylvania violations were conscious and deliberate, represented a calculated risk taken by petitioner and the other carriers, and the fines paid were criminal penalties for violation of state law. Accordingly, the Tax Court disallowed the Pennsylvania fines as deductible ordinary and necessary business expenses, since the deduction would, in the opinion of the Tax Court, have the effect of mitigating the degree of punishment and of frustrating the purpose and effectiveness of the Pennsylvania weight limit (R. 131a-133a). The Court of Appeals affirmed this holding by reasoning that the weight legislation in and of itself created a sharply defined state policy which in a tax controversy could not thereafter be examined (R. 140).

New Jersey.

Petitioner incurred and paid to New Jersey fines and incidental costs on seven different occasions aggregating $2,830.00 for operating overloaded vehicles on the New Jersey highways. The New Jersey limit was 60,000 pounds. In all cases known to petitioner, at no time did petitioner operate vehicles in the state of New Jersey carrying a

weight in excess of the 60,000 pounds prescribed generally for the equipment in that state and this was true for the other carriers in the industry. However, the seven fines were levied under a reciprocity provision of the New Jersey law whereby motor vehicles licensed and registered in Pennsylvania, although carrying a weight less than the 60,000 pounds allowed generally, were in violation of the New Jersey weight limitation law if their weight was in excess of the 45,000 pounds, plus the 5% leeway, allowed by Pennsylvania (R. 119a, 133a).

The interstate operation of the bulk liquid motor vehicles was a common and frequent occurrence in the industry and the widespread practice of filling the tanks to capacity, although not creating a weight in excess of the 60,000 pounds allowed generally by New Jersey law, nevertheless caused petitioner's and the industry vehicles to exceed the Pennsylvania limit on a substantial number of the New Jersey trips (R. 116a, 126a, 127a).

The Tax Court concluded that New Jersey, for reasons best known to itself, had undertaken to accommodate its penal provisions to those of Pennsylvania by the reciprocity provision, and made it a criminal offense to operate Pennsylvania vehicles on the New Jersey highways which exceeded the lower Pennsylvania limits. It reasoned that the violations were just as deliberate as the ones occurring in Pennsylvania itself, and the fines and costs were similarly not deductible (R. 133a). This likewise was the conclusion of the Court of Appeals (R. 141).

Other States.

Petitioner incurred and paid in 1951 twenty-eight fines, including incidental costs, aggregating $1,294.69 in the states of Ohio, Delaware, Maryland and West Virginia. The fines pertained to overweight violations which were neither wilful nor negligent, and this was true of the industry as a whole. By the very nature of the commodity and the equipment, the exact weight could not be always

controlled. Temperature changes could produce a variance in weight, residual variations in the same commodity of different refineries produced variances in weight, and a combination of a particular tractor with a particular semi-trailer could, at times, produce an axle weight violation, all of which took place despite any precautions that could fairly be demanded consistent with a practical operation of the business (R. 119a, 122a, 123a, 127a).

With respect to the violations in these states, the Tax Court adopted the reasoning of the District Court in *Hoover Motor Express Co., Inc. v. U. S.*, 135 F. Supp. 818, and held that even assuming that petitioner took every precaution that could fairly be demanded of a prudent motor carrier consistent with a practical operation of its business to comply with the weight limitations, nevertheless the weight laws treated the wilful and innocent violator alike, and to allow the income tax deduction for inadvertent and innocent violations would frustrate clearly defined policies of the applicable state weight statutes (R. 134a-135a). Similarly, the Court of Appeals found no justification for distinguishing between the wilful breach and the innocent mistake, and concluded that the purpose of the motor vehicle laws would be frustrated just as much in the unintentional cases as in the wilful transgressions, since they were in disregard of the local laws (R. 141).

SUMMARY OF ARGUMENT.

I.

The sums paid by reason of the state fines imposed for operating motor vehicles which exceeded the maximum gross weight prescribed by the statutes of Pennsylvania, New Jersey, and the other states were deductible as ordinary and necessary business expenses under Section 23(a)(1)(A). The long established and widespread practice in the industry was to fill the standard sized equipment to capacity, causing it to exceed the extremely low maximum weight required by Pennsylvania law, although it conformed to the weight allowed by all the other states through which petitioner and the industry operated interstate. Only by such capacity loading was petitioner able to remain in business and the operation of such vehicles, from which the Pennsylvania fines arose, was of common and frequent occurrence in the industry.

The New Jersey fines pertained to interstate operations where petitioner's Pennsylvania vehicles, although they carried a weight otherwise permissible under New Jersey law, were in excess of the considerably lower limit permitted by Pennsylvania and were therefore in violation of a reciprocity provision of the New Jersey statute. The payment of the fines in the neighboring states arose from interstate operations where the violations were neither wilful nor negligent and occurred despite every precaution that could fairly be demanded, consistent with a practical operation of the business. Hence, the fines arising out of all of the violations were common, frequent, appropriate, and necessary in the type of business involved. In short, they were deductible as ordinary and necessary business expenses.

The disallowance of the deductions sought was predicated upon a clearly erroneous "public policy" qualification of the generally accepted meaning of the words "ordinary and necessary"—that to give income tax recog-

nition to the fines as deductible business expenses would frustrate a sharply defined state policy evidenced by the respective weight limitation laws.

The legislative history of the income tax law amply demonstrates that Congress specifically has considered on more than one occasion and has rejected any qualification that would deny deductibility to ordinary and necessary business expenses on a public policy rationale applicable to expenditures which themselves violated a state law or were incidental to such violation. The applicable Treasury regulations and opinions of this Court reaffirm this legislative history that the revenue act is concerned with the taxation of net income, unaffected by any restriction of public policy and is not designed as an arm of the law to enforce state criminal statutes by augmenting the punishment which the state inflicts. Since Congress has not done so, it is not at all relevant to consider whether Congress, had it chosen, might have excluded expenses incurred directly in violation of state law or fines incidental thereto from permissible deductions.

There is no warrant in the opinions of this Court in *Commissioner v. Heininger*, 320 U. S. 467 (1943), and *Lilly v. Commissioner*, 343 U. S. 90 (1952) for the assertion that this Court has approved any "judicial gloss" of public policy. On the contrary, the opinions indicate that any test based on illegality or public policy must be abandoned as a judicial guide. Instead of any workable rule or legal theory which is of rational use, there has evolved in the lower courts only confusion and chaos in attempting to apply an illegality or public policy test for the disallowance of deductions, in the absence of definitive legislative standards. If frustration of national or state policies evidenced by governmental statutes is the proper touchstone of non-deductibility, there can be no relevant distinction between fines and penalties imposed and the legal expenses incurred in an unsuccessful defense to prevent their collection. Yet the lower courts attempt to make the distinction. The legal expenses have been held deductible, the fines apparently not.

Furthermore, violations of complicated and involved statutes and regulations are today a common business risk, and penalties incurred in the ordinary course of business a normal cost of doing business. A rule developed by the lower courts refusing to allow the deduction of fines or penalties if the violations were deliberate or avoidable, but allowing them in some instances if they were unintentional and avoidable, is not justified by the numerous decisions which have repeatedly held that a taxpayer may deduct damages paid to a private person because of a wrong or tort committed in the operation of his business, regardless of his wilfulness or deliberateness. Nor can the private and public wrong situations be distinguished properly on the ground that one involves restitution as opposed to penalty, or that a private party plaintiff is involved as opposed to the sovereign.

This Court's opinion in *Textile Mills Securities Corp. v. Commissioner*, 314 U. S. 326 (1941) gives no support to any application of the public policy doctrine by the lower courts, in view of the contrary congressional policy expressed and the absence of any interpretive regulation applicable to fines and penalties imposed by state law.

Moreover, if there can be deducted, as has been held, the integral unlawful expenses of an illegal business, morally wrong and socially condemned, the transgressions of a socially desirable, legitimate business here presented cannot properly be singled out for tax punishment by the disallowance of expenses, otherwise ordinary and necessary, which may be incidental thereto.

The existence of taxable income where there is none cannot be permitted to be found merely on the ground of some public policy. This has been partly recognized in the fictitious differentiation which is said to require that illegal payments entering into the cost of goods sold or serving as a reduction of gross receipts must be taken into account in the computation of gross income, whereas similar illegal payments are not deductible as ordinary and

necessary business expenses. Such an artificial distinction should be wiped out and the only consistent and realistic approach is to disregard illegality, immorality, and public policy as such and determine tax liability on the basis of the taxpayer's true commercial net income, however, it is produced. Abandonment of a public policy test, which uses the deduction provision as a medium for judicial expression of moral attitudes, would not mean that all sorts of illegal and immoral expenses would automatically become deductible. The proper statutory criteria of "ordinary and necessary," as interpreted by this Court, would still allow most of the objectionable payments to be disallowed where they are either not ordinary or necessary in the particular business involved. This means that the fines involved herein, arising from customary, normal overweight operations necessary to petitioner's continued business life, meet the statutory standard.

This proper approach gives no advantage to the illegitimate over the lawful enterprise since each type of business is to be separately examined to see whether or not the expenses sought to be deducted are in fact ordinary and necessary for that business.

The tax laws are to be interpreted so as to have a uniform application in the states of the United States. State laws vary far too much in their scope and operation to allow the purpose of taxing net income to be dependent on state whim or to justify federal interference into fields of law enforcement heretofore wholly left to the states and local communities.

The public policy test of the lower courts places socially harmless individual violations of unpopular or anachronistic legislation, having no purpose to suppress crime, but merely the objective of prohibiting acts contrary to local notions of public policy, on a par with organized criminal activity. Unless checked, this test leads to a tax on gross, not on net income, contrary to the intendment of the revenue

act, by outlawing purely legitimate expenses incurred in any activity which a state may be said to seek to prevent.

II.

Even if certain expenditures otherwise ordinary and necessary under Section 23(a)(1)(A) are not deductible if they are penalties, the allowance of which would frustrate a sharply defined national or state policy, the payments which were made in connection with the three types of fines presented here are still deductible. The tax sanction of nondeductibility, when predicated upon such frustration, can still only be justified if the tax deduction would interfere with enforcement provisions, designed to punish past and deter future violations, of state statutes containing a "sharply defined," i.e., important and rational state policy that warrants the type of social condemnation that is or ought to be implicit in the concept of crime.

The fine in the Pennsylvania scheme of enforcement was neither, in fact or intention, punishment for past nor a deterrent to future overweight violations. Instead, it was imposed as a remedial or revenue measure, to cover restitution for supposed damage to the highways of the state. The legislature recognized this by consciously imposing the fine in one of two fixed non-graduated amounts, not on the carrier actually responsible for the violation, but on the employee-driver, and providing expressly that the fines be used by the local municipalities for the construction, repair, and maintenance of its highways. The studied enforcement policy, always to accept the small fine and never to require removal of excess load, likewise demonstrates an intention to allow uninterrupted, continued operation of the overloaded equipment. In addition, the 1955 amendments to the Vehicle Code of Pennsylvania indicate a legislative recognition of the place of the fine in the earlier scheme of enforcement—to allow continued operation of equipment which had been operating in adjoining states

without causing damage to the roads or an obstacle to traffic upon payment of a fee in the form of a fine.

This also was the exact position previously taken by the respondent himself, when by letter ruling in effect during the period 1942-1950, the payments of fines for overweight violations, were held deductible as ordinary and necessary business expenses in the nature of tolls, rather than as penalties. In addition, the fact that neither the Pennsylvania Public Utility Commission nor the Interstate Commerce Commission for its own purposes outlawed the fine as a legitimate operating expense of motor carriers, indicates that the allowance of the fines as income tax deductions would not be offensive to the real policies and purposes of the Pennsylvania weight limitation law. Thus, since Pennsylvania was content freely to permit continued operation of the overloaded equipment upon payment of the small fine, an integral part of the cost of such continued operation, even in the form of a fine, is a tax deductible business expense.

The tax deduction of the fines imposed by New Jersey for operating on the New Jersey highways vehicles bearing a weight in excess of the Pennsylvania limit, but otherwise permissible under New Jersey law, would not frustrate any sharply defined policy of either New Jersey or Pennsylvania law to protect persons or property on the highways of the respective states.

The allowance of the tax deduction for the payments of the fines imposed for the inadvertent and unintentional violations in the other states would in no way frustrate the deterring or punishing aspects of the state statutes. The fines were incurred despite every precaution that could fairly be demanded, consistent with a practical operation of the business, and although the weight laws make no express distinction between innocent and wilful violators, justification for this can be found in an attempt to eliminate delaying litigation before the minor judiciary, rather than to punish each equally.

ARGUMENT.

I. The Amounts Paid by Reason of the State Fines Imposed for the Overweight Violations Are Deductible as Ordinary and Necessary Business Expenses.

Petitioner, a motor carrier of bulk liquids, paid obligations in the taxable year 1951 for three types of fines, all for operating on the highways of the various states motor vehicles which exceeded a statutory weight limitation. A substantial majority of the violations occurred in Pennsylvania. Pennsylvania had considerably lower weight limitations than the surrounding states through which petitioner and the industry operated. It was the common, widespread and long established practice in the industry to fill the vehicles to capacity. Petitioner had to carry full loads in order to stay in business, although when its standard size vehicles were so loaded with liquids other than gasoline, they were necessarily always in excess of the Pennsylvania legal limit and subject to fines, despite the fact they carried a weight permissible in the other states. Sums accordingly were paid by petitioner, as was true with the industry as a whole, pursuant to union contracts with its truck drivers to indemnify them against the fines imposed by Pennsylvania on the drivers for so driving the overloaded equipment.

In addition, fines were imposed on petitioner directly—in some instances by New Jersey, which used the lower Pennsylvania weight limitation for petitioner's Pennsylvania licensed vehicles, despite the fact the vehicles were within the weight prescribed generally by New Jersey law, and in the other instances, by the remaining states involved, where the violations admittedly were innocent, inadvertent and occurred despite every precaution that could fairly be demanded, consistent with a practical operation of the business.

The respondent, Tax Court and Court of Appeals, disallowed the deduction sought by petitioner for these payments as ordinary and necessary business expenses under Section 23(a)(1)A, on the asserted ground of public policy. It is the petitioner's main contention that there is no warrant in the Internal Revenue Code, the applicable Treasury regulations or the decisions of this Court for the "judicial gloss" of public policy and that the fines sought to be deducted were plainly allowable as ordinary and necessary business expenses. Moreover, even if certain expenses otherwise ordinary and necessary under Section 23(a)(1)A are not deductible if their allowance would frustrate sharply defined national or state policies, it is petitioner's alternative contention that no such frustration is presented in any of the three types of fines involved herein.

a. *Legislative History.*

This Court has pointed out that "There is no statement in the Act or in its accompanying regulations, prohibiting the deduction of ordinary and necessary business expenses on the ground that they violate or frustrate 'public policy'." *Lilly v. Commissioner*, 343 U. S. 90, 94 (1952). The legislative history of the income tax law amply demonstrates that the Congress specifically has considered on more than one occasion and has rejected any qualification that would deny deductibility to ordinary and necessary business expenses on a public policy rationale applicable to expenditures which themselves violated a federal or state law or were incidental to such violation. The 1913 bill, as reported by the Senate Finance Committee, in Section II(A) and (G) (b) (38 Stat. 116) (the predecessor to Section 23(a) (1)A) granted individuals a deduction for the "necessary expenses actually paid in carrying on any business," gave corporations a similar deduction for "all the ordinary and necessary expenses paid within the year in the maintenance and operation" of their "business and

properties" and in the same section authorized individuals to deduct "losses actually sustained during the year, incurred in trade" and corporations "all losses actually sustained within the year." Seidman, Legislative History of Federal Income Tax Laws, 1938-1861, pp. 992, 995 (1938). Senator Sterling of South Dakota proposed several amendments contending that these provisions were too generous, that they should be "qualified by some such expression as 'losses incurred in legitimate and ordinary trade pursued by the party' or equivalent words." 50 Cong. Rec. 3849 (1913). "It is the purpose of the amendment simply to prevent a claim for losses or a deduction of losses arising out of a trade or business carried on in violation of law." 50 Cong. Rec. 4613 (1913).

The suggested amendments were rejected. Senator Williams, who opposed the proposal, stated in debate, ". . . the object of this bill is to tax a man's net income; that is to say, what he has at the end of the year after deducting from his receipts his expenditures or losses. It is not to reform men's moral characters; that is not the object of the bill at all. The tax is not levied for the purpose of restraining people from betting on horse races or upon 'futures,' but the tax is framed for the purpose of making a man pay upon his net income, his actual profit during the year. The law does not care where he got it from, so far as the tax is concerned, although the law may very properly care in another way." 50 Cong. Rec. 3849 (1913).

Although Senator Sterling's proposals were directed in part to deductible losses, rather than deductible expenses, the debates clearly indicate Congress had no intention of limiting either deduction, whether technically "losses" or "expenses," in the manner proposed. Nor have the respondent or the courts differentiated between expenses and losses in applying the disallowance doctrine of public policy. *U. S. v. Maginnis Konstzide Unie N.*

F. 226 F. 2d 115 (C. A. 4, 1955), certiorari denied, 350 U. S. 962 (Loss incurred by foreign corporation doing business in this country when certain of its assets were vested by the United States under the Trading with the Enemy Act); *Fullerton Commissioner*, 213 F. 2d 102 (C. A. 10, 1954) (Loss incurred when whiskey, being sold in a dry state, was confiscated by law enforcement officials).

In 1951 Senator Kefauver four times sought unsuccessfully to amend Section 23(a)(1)A by prohibiting deductions "for any expense incurred in or as a result of illegal wagering." 97 Cong. Rec. 12230-31 (1951). He preferred this type of amendment to the proposed wagering tax. Senator George argued that, since the income tax is a tax on the net, if a taxpayer's losses exceed his gains, there is nothing to tax. He found, therefore, that Senator Kefauver's proposal by way of substitute for the wagering tax was "clearly an illegal, unconstitutional proposal to deny deductions against the income of someone who has been engaged in a wagering enterprise." 97 Cong. Rec. 12244 (1951).

Furthermore, prior to the recodification of the Internal Revenue Code in 1954, the American Law Institute recommended that Congress change the statute to disallow deductibility "for any expenditure which is—

> (1) itself illegal or contrary to a governmentally declared national or state policy proscribing a particular type of conduct; or
>
> (2) applicable to an obligation in the nature of a fine or penalty imposed by law, and not primarily for compensatory damages nor incurred despite the taxpayer's exercise of appropriate care, if the deduction of the expenditure for tax purposes would clearly frustrate a policy of the legislation imposing the obligation." (Section X165(i), American Law Institute, Federal Income Tax Statute (February 1954 draft, Vol. I). However, Section 23(a)(1)A as re-enacted in Section 162 of the 1954 Code remained unchanged in this respect.

This legislative history, revealing that the Congress deliberately has refused to qualify ordinary and necessary business expense deductions by reference to illegality or public policy, is not impaired by the failure of the Congress to take affirmative action from the time the public policy doctrine began to evolve in the lower courts. The first appellate decision recognizing the penalty and attorney fee aspects of the doctrine did not appear until the 1930 decision in *Great Northern Ry. Co. v. Commissioner*, 40 F. 2d 372 (C. A. 8), certiorari denied, 282 U. S. 855 (Fines for violations by railroad of federal regulatory statutes and attorney fees for unsuccessful defense thereof). Since then the doctrine has had, as will be shown, a most confusing career in the courts. This Court has on occasion commented on the lack of significance of congressional silence. "Re-enactment—particularly without the slightest affirmative indication that Congress ever had the *Highland Farms* decision before it—is an unreliable indicium at best." *Commissioner v. Glenshaw Glass Co.*, 348 U. S. 426, 431 (1955)). "... we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." *Helvering v. Hallock*, 309 U. S. 106, 121 (1940).

Moreover, for a period of almost eight years, from September 1942 to December 1950, the respondent himself ruled that the exact types of fines involved in the instant case covering violations by motor carriers of state laws relating to maximum weights of the type of trucks involved herein were deductible as ordinary and necessary business expenses (Appendix, 9a-12a). And during this period of congressional silence, a good deal of the public policy doctrine, as urged by respondent, was rejected by this Court in *Commissioner v. Heininger*, 320 U. S. 467 (1943) (Attorney fees deductible for unsuccessful defense against a postal fraud order) and by the Second Circuit in *Jerry Rossman Corp. v. Commissioner*, 173 F. 2d 711 (1949) (Penalty for innocent O. P. A. price violation deductible).

In addition, there is ample evidence that the Congress will affirmatively speak out on public policy grounds when indeed it wants to. Scattered throughout the Code are various indications of congressional awareness of policy considerations involved. For example, Section 23(h), which was first enacted in 1934 (Section 23(g) of Revenue Act of 1934, 48 Stat. 680) limits the deduction of losses from all gambling, legal or illegal, to wagering gains, as a means, not of penalizing gambling, but of preventing a specific type of tax evasion whereby gambling losses were previously deducted and taxable gambling gains unreported. And Sections 23(o)(2) and 23(q)(2) permit a limited deduction for charitable contributions only if no substantial part of the activities of such charities is the carrying on of propaganda or otherwise attempting to influence legislation. Even more significant is the fact that where Congress has wished to deny tax deductions as a means of reinforcing the sanction of other federal statutes, it has explicitly so provided. Violations of the wage stabilization provisions of the Stabilization Act of 1942 (Sec. 5(a), 56 Stat. 767 (1942), 50 U. S. C. A. App. 965(a)) and of the Defense Production Act of 1950 (Sec. 405(b), 64 Stat. 807 (1950), 50 U. S. C. A. App. Sec. 2105(b)) and of the price ceiling provisions of the Defense Production Act (Sec. 104(i), 65 Stat. 136 (1951), 50 U. S. C. A. App. Sec. 2105(a)) can statutorily lead to a certification to the Treasury Department for income tax disallowance of wages and the purchase price of goods. See *Pedone v. U. S.*, 151 F. Supp. 288 (Ct. Claims, 1957), certiorari applied for; *Commissioner v. Weisman*, 197 F.2d 221 (C. A. 1, 1952).

b. *Tax on Commercial Net Income.*

The applicable Treasury regulations and opinions of this Court reaffirm the foregoing legislative history that the Income Tax Act is concerned with the taxation of the "commercial net income" unaffected by any restriction of

public policy. "Although taxable net income is a statutory conception, it follows, subject to certain modifications as to exemptions and as to deductions for partial losses in some cases, the lines of commercial usage. Subject to these modifications, statutory net income is commercial net income. . . ." Treas. Reg. 111, Sec. 21.21-1. "Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business. . . ." Treas. Reg. 111, Sec. 29.23(a)-1. Or, as this Court has said, "The purpose here is to tax earnings and profits, less expenses and losses. If one or the other factor in any calculation is unreal, it distorts the liability of the particular taxpayer to the detriment or advantage of the entire taxpaying group." *Higgins v. Smith*, 308 U. S. 473, 477 (1940). And, as Mr. Justice Black has said, "Taxation on net, not on gross, income has always been the broad basic policy of our income tax laws. Net income may be defined as what remains out of gross income after subtracting the ordinary and necessary expenses incurred in efforts to obtain or keep it." *McDonald v. Commissioner*, 323 U. S. 57, 66-67 (1944).

Hence, although Congress may not have allowed the deduction from gross income of all trade and business expenses, it has, at the very least, allowed since 1918 all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any business (see *Higgins v. Commissioner*, 312 U. S. 212, 215 (1941)) and "'general equitable considerations' do not control the question of what deductions are permissible." *U. S. v. Olympic Radio and Television, Inc.*, 349 U. S. 232, 236 (1955). If equitable considerations do not control what deductions are permitted, they do not dictate what ones are to be disallowed. *Lewyt Corporation v. Commissioner*, 349 U. S. 237, 240 (1955). "Their extent depends upon the legislative policy expressed in the fair and natural mean-

ing of [Section 23]." *Lykes v. U. S.*, 343 U. S. 118, 120 (1952). And just as equitable considerations can neither expand nor restrict the scope of the statutory deduction, similarly public policy considerations should not be permitted to do so.

c. *Meaning and Application of Ordinary and Necessary.*

It is recognized that the statutory language necessarily opens up a wide field for interpretation, as the line is drawn from case to case between what is and is not an "ordinary and necessary" business expense within the meaning of Section 23(a)(1)A. *Commissioner v. Weisman*, 197 F. 2d 221, 226 (C. A. 1, 1952). But this Court has circumscribed the boundaries of such examination. Where an expenditure "is directly connected with" or "proximately resulted" from business, it is a business expense. *Kornhauser v. U. S.*, 276 U. S. 145, 153 (1928). The expense is an ordinary one when it is "normal, usual or customary" in the industry (*Deputy v. du Pont*, 308 U. S. 488, 495 (1940)), when the "transactions from which they arose were of common or frequent occurrence in the type of business involved." *Lilly v. Commissioner*, 343 U. S. 90, 93 (1952). Finally, this Court has held that an expense is "necessary" if it is "appropriate and helpful" in the conduct of the business concerned (*Commissioner v. Heininger*, 320 U. S. 467, 471 (1943)), with this Court "slow to override" the taxpayer's "judgment." *Welch v. Helvering*, 290 U. S. 111, 113 (1933).

Tested by these standards, and absent any judicial gloss of "public policy," it is obvious that petitioner's payments pertaining to the three types of fines fell well within Section 23(a)(1)A. Indeed the Court of Appeals so conceded when it observed that "certain expenditures otherwise ordinary and necessary under Section 23(a)(1)A of the Internal Revenue Code of 1939 are not deductible if their allowance would frustrate sharply defined national and state policies . . . ." (R. 139).

Taking up the three types of fines separately, there is no dispute that it was a common, widespread, and long established practice in the industry of transporting bulk liquids by motor vehicles in Pennsylvania to fill the standard size semi-trailer tanks to capacity, causing the equipment carrying anything but gasoline to exceed the exceedingly low Pennsylvania maximum gross weight requirement (R. 118a). The payments by petitioner of fines imposed on each of its Pennsylvania overweight vehicles stopped by the authorities in the taxable year were in the same respective statutory amounts as those imposed on the vehicles of all other carriers in the industry for similar violations. Under union negotiated contracts with its employee drivers, petitioner was obligated to indemnify the drivers, and consequently did pay the fines imposed on the drivers for the overweight vehicles. The other carriers did likewise (R. 128a). Accordingly, the operation of motor vehicles which exceeded the Pennsylvania limit, from which the fines arose, was of common and frequent occurrence in the type of business involved. The payments of the Pennsylvania fines were thus "ordinary" in the generally accepted meaning of the word for purposes of Section 23(a)(1)A.

The payments of the Pennsylvania fines likewise were "necessary" in the generally accepted meaning of that word. As the Tax Court found, only by operating equipment filled to capacity, which caused the equipment to be overweight in Pennsylvania, was petitioner able to remain in business (R. 124a). The rate structure was predicated upon capacity loading of the standardized equipment. Smaller loads would have caused petitioner to operate at a loss. An increase in rental to compensate for the reduced loads would have referred the business to competitors. Furthermore, partially loaded tanks created a hazard to the safety of the operation. Acquisition of smaller equipment to cover the safety problem would have been uneco-

necessary" imply "a condition that the payments themselves must not be illegal." *Boyle, Flagg and Seaman, Inc.*, 25 T. C. 43, 50 (1955). Under this view, which has as its basis the discredited notion that "the law will not recognize the necessity of engaging in illegal courses in the conduct of a business," both the Tax Court and the Courts of Appeals have at various times held that "expenditures which are wrong in themselves or which violate Federal or State law do not qualify as ordinary and necessary business expenses under the statute." *Boyle, Flagg and Seaman, Inc., supra*, at 50. Thus the amounts paid in splitting insurance premiums by an insurance broker with non-licensed automobile dealers for soliciting insurance for it, were held non-deductible by reason of the violation of the insurance laws of Illinois, even though it was the common practice of Illinois insurance brokers to make such payments, and the automobile dealers would not have referred their business to the taxpayer unless it made such payments.

Without considering whether the payments frustrated public policy, the Tax Court relied on what it called a different, although related, line of decisions and preferred to base its decision on the illegality of the expenditure. The Tax Court has believed that this "illegality" of expenditure test finds support in such cases as *Gallatin Farmers Co. v. Commissioner*, 132 F. 2d 706 (C. A. 9, 1943) (Patronage dividends paid in violation of state law); *Rugel v. Commissioner*, 127 F. 2d 393 (C. A. 8, 1942) (Payments to influential party precinct captain in order to obtain a state printing contract); *T. G. Nicholson*, 38 B. T. A. 190 (1938) (Payments made to state senator for his political influence in obtaining favorable conditions covering the bidding on a public contract); *Eastern Tractor & Equipment Co., Inc.*, 35 B. T. A. 189 (1936) (Commissions paid for personal influence in obtaining public contracts). It should be noted that not even "illegality" is

nomical from the revenue standpoint, and financially hazardous in view of the legislation which was periodically proposed to the Pennsylvania legislature to increase the weight limitation to conform to that of the neighboring states. The smaller equipment likewise would have been worthless for the interstate operations, where the neighboring states allowed the larger sized equipment to be utilized fully (R. 125a-126a).

Petitioner consciously chose to conform to the economic realities of the low discriminary Pennsylvania weight law and to stay in business. The continuance of the practice of operating overweight equipment in Pennsylvania was necessary to petitioner's continued business existence. Hence, the payments, pursuant to the union negotiated agreements, of the Pennsylvania fines imposed on its employee-drivers, were as appropriate, helpful and essential as petitioner's other business expenses. They were directly connected with and proximately resulted from the business. Accordingly, they constituted "necessary" business expenses within the meaning of Section 23(a)(1)A.

Similarly, it was necessary that petitioner's and the industry's fleet of equipment be utilized in interstate operations in states other than Pennsylvania. In all instances for which petitioner was fined in New Jersey, the vehicles, although they were under the 60,000-pound limit otherwise permissible in New Jersey, were in excess of the exceedingly lower Pennsylvania limit permitted by Pennsylvania law and were therefore in violation of the reciprocity provision of the New Jersey law (R. 119a, 133a). The payments of fines in the other neighboring states in and through which petitioner's vehicles operated interstate pertained to violations which were neither wilful nor negligent, and the fines were incurred despite every precaution that could fairly be demanded consistent with a practical operation of the business (R. 122a-123a, 127a, 134a). All these violations were of sufficient frequency to the petitioner and to the industry

the alleged test since, despite the admonition in *Lilly* that if a public policy test is to be applied, the policy must be evidenced by a legislative declaration, the expenditures assertedly can be disallowed as "wrong in themselves." But it is not clear whether it is the respondent or the courts which are supposed to sit in judgment on the morality of the taxpayer. This Court in the *Lilly* case found that kickbacks by opticians to physicians for referring patients to them for eyeglasses were deductible. These look "wrong in themselves." The respondent attacks bribes and political influence, yet himself rules that kickback and bribe payments to induce employees or agents of customers to promote purchases by the customers, or to officials of foreign governments, are deductible. Rev. Rul. 54-27, 1954-1 Cum. Bull. 44; Sp. Ruling, March 11, 1957, 103 Cong. Rec. 11232 (1957 CCH Stand. Fed. Tax Rep., Vol. 3, ¶ 6654). And the Tax Court finds nothing wrong in bribes or kickbacks to ship captains and officers by companies in the ship chandlery business. *Frank Valetti* 28 T. C. No. 75 (1957). These are not illegal and not in violation of what would appear to be applicable state statutes, so it is said, since they are made with the knowledge and assent of the ship owner. *Fiamholis v. U. S.* (E. D. S. C., 1957 CCH Stand. Fed. Tax Rep., Vol. 5, ¶ 9805). A tax law that turns on these gymnastics substitutes form for substance.

When examination is made of the deductibility of expenditures incurred in illegal businesses, the unfairness of disallowing the instant fines on the variant of public policy becomes even more apparent. The argument is not as the Tax Court in *Boyle, Flagg and Seaman, Inc., supra*, at p. 59 tried to pitch it, that since fines and penalties imposed for activity in violation of state statutes cannot be deducted, the expenditures in the activity itself are likewise non-deductible, but instead it is more properly pitched to the fact that since these expenditures are themselves deductible, clearly the more so are the fines and penalties. The cases of *Ross, Sullivan and Mesi v. Com-*

to render them ordinary. The inadvertent ones resulted from the accepted practice in the industry to load by gallons and to continue in transit despite temperature changes or breakdown, by the use, in the latter instance, of substitute equipment (R. 122a-123a). The New Jersey violations resulted from the accepted and necessary practice in the industry to fully utilize the standard equipment in interstate operations. Hence, the fines pertaining to all of these violations were appropriate, helpful and necessary. In short, they were deductible under the statute.

Thus, it develops that the crucial question is whether the normal, customary and essential expenses involved in petitioner's completely lawful and legitimate business are deprived of deductibility because they were brought about by business activity, necessarily compelled on the industry as a whole, which Pennsylvania and the other states declared to be subject to fine. It is not at all relevant to consider whether Congress, had it chosen, might have excluded expenses incurred directly in violation of state law or fines incidental thereto from permissible deductions, or imposed a tax upon a different definition of net income in respect to businesses in violation of some aspect of state law. Sufficient it is that Congress has not done so; but has taxed only the net income which remains after the deduction of all ordinary and necessary expenses in carrying on the business. "The revenue act was not contrived as an arm of the law to enforce State criminal statutes by augmenting the punishment which the State inflicts." *Burroughs Building Material Co.*, 18 B. T. A. 101, 105 (1929).

In support of the disallowance the respondent and the courts below have insisted that to allow the tax deduction for the fines in some way reduces and so, in part, defeats the prescribed state punishment. This is an entirely specious argument because it overlooks the bald fact that the denial of the tax deduction, on the other hand, augments and increases the so-called state punishment by imposing a

tax on monies which petitioner was forced to expend and could not retain. Thus, the denial of the tax deduction is in reality the imposition of a double penalty never contemplated by the state when it fixed the fine in a definite amount, regardless of the wealth or poverty of the violator. There is no reason to assert judicially, in the absence of congressional legislation specifically dealing with the matter, that Congress under the language of Section 23(a)(1)A intended to impose such double penalty.

d. *The Heininger and Lilly Cases.*

Petitioner submits that there is no warrant in the opinions of this Court in *Heininger* and *Lilly* for the assertion of the respondent and the courts below that this Court has approved any "judicial gloss" of "public policy." In *Heininger*, this Court noted that "The Bureau of Internal Revenue, the Board of Tax Appeals, and the federal courts have, from time to time, however, narrowed the generally accepted meaning of the language used in Section 23(a) in order that tax deduction consequences might not frustrate sharply defined national or state policies proscribing particular types of conduct." 320 U. S. at 473. Then the opinion pointed out that "The language of Section 23(a) contains no express reference to the lawful or unlawful character of the business expenses which are declared to be deductible." Following this, the opinion accepted the disclaimer in the government's brief of "any contention that the purpose of tax laws is to penalize illegal business by taxing gross instead of net income." 320 U. S. at 474. Plainly, this latter observation does not endorse any public policy doctrine that expenses incidental to unlawful business activity or in violation of law are not deductible. For, as will be discussed in more detail later, under any such theory, illegal businesses or activities should not be allowed any deductions at all, even of strictly so-called legitimate expenses, since they frustrate the state policy to prevent the prohibited activity. Hence, rather than approving a

public policy limitation, the opinion of this Court in *Heininger* casts grave doubts on its use.

Furthermore, in *Lilly* this Court again took great pains to point out that "There is no statement in the Act or in its accompanying regulations prohibiting the deduction of ordinary and necessary business expenses on the ground that they violate or frustrate 'public policy'." 343 U. S. at 94. Then this Court was most careful merely to observe, but not to approve, that it could be argued with respect to expenditures which themselves violated a federal or state law or were incidental to such violations, such as penalties for unlawful conduct and legal fees incident to the defense of a taxpayer against charges of illegal conduct, that the outlawed expenditures, "by virtue of their illegality," were not ordinary and necessary business expenses within the meaning of Section 23(a)(1)A (p. 94-95). At most, this Court would assume "for the sake of argument that, under some circumstances, business expenditures which are ordinary and necessary in the generally accepted meanings of those words, may not be deductible as 'ordinary and necessary' expenses under Section 23(a)(1)A when they 'frustrate sharply defined national or state policies proscribing particular types of conduct'." (pp. 96-97)

But no such situation was before this Court in the kickbacks by the opticians to the physicians. Rather than justification for the assumption that this Court would disallow deduction of an illegal expense if it were established that such an expense were ordinary and necessary, it would seem, to the contrary, that the opinion indicates that any test based on illegality or public policy must be abandoned as a judicial guide.

An examination of the numerous decisions in the field reveals only utter confusion and inconsistency resulting from the judicial attempt to disallow otherwise ordinary and necessary business expenses when they "frustrate sharply defined national or state policies proscribing par-

ticular types of conduct," even when the admonition of this Court that such policies must be "evidenced by some governmental declaration of them" is strictly observed. *Lilly v. Commissioner*, *supra* at 97. It reveals that there can be no workable rule or legal theory used, in the absence of definitive legislative standards, which can justify the disallowance of the deduction.

c. Fines and Legal Fees Incident Thereto.

One category of cases lies in the penalty or fine type of situation involved in the instant case. Prior to *Heininger*, no distinction was made by the lower courts as to the non-deductibility of fines and penalties, on the one hand, and legal expenses incurred in an unsuccessful effort to prevent their collection, on the other hand. *Helvering v. Superior Wines and Liquors, Inc.*, 134 F. 2d 373 (C. A. 8, 1943); *Burroughs Building Material Co. v. Commissioner*, 47 F. 2d 178 (C. A. 2, 1931). "If it is never necessary to violate the law in managing a business, it cannot be necessary to resist a decree in equity forbidding violations, except in cases where an injunction is unjustified. There is indeed less to be said for spending money in that way than in defending a criminal prosecution, for the decree by hypothesis will do no more than forbid what the taxpayer ought not to do anyway." *National Outdoor Advertising Bureau, Inc. v. Helvering*, 89 F. 2d 878, 881 (C. A. 2, 1937). "... we can see no relevant distinction between [payment of fines and forfeitures] and legal expenses incurred in an unsuccessful effort to prevent their collection. Indeed, to hold otherwise would be to subsidize the obduracy of those offenders who were unwilling to pay without a contest and who thereby added impenitence to their offenses." *Jerry Bisogno Corp. v. Commissioner*, 175 F. 2d 711, 713 (C. A. 2, 1949). Hence, when this Court allowed in *Heininger* the deduction for attorney fees paid in good faith for unsuccessfully resisting the issuance by the Postmaster General of a "fraud order" which would destroy the

taxpayer's business, a substantial tenet of the penalty doctrine was overruled. The doctrine as expressed in *National Outdoor Advertising Bureau, Inc. v. Helvering*, *supra*, at 81, that "the law will not recognize the necessity of engaging in illegal courses in the conduct of a business."

Plainly, this Court in *Heininger* made no real distinction between legal expenses, on the one hand, and fines or penalties, on the other. And none there can be. Penalties and attorney fees stand on the same footing. We believe this Court recognized this from the citation of both types of cases interchangeably in footnote 8 on page 473 of the opinion. Indeed, the Tax Court was willing to accept this interpretation when it allowed as deductions both the attorney fees for the unsuccessful defense and the penalties paid to the state of Texas under a consent decree for violations of that state's anti-trust laws. *Longhorn Portland Cement Co.*, 3 T. C. 230 (1944). But the Court of Appeals for the Fifth Circuit reversed the deductibility of the penalty payment, without regard to the guilt or innocence of the taxpayer, saying, "the ultimate determinative inquiry upon this appeal is whether the deduction claimed was paid as a penalty." *Commissioner v. Longhorn Portland Cement Co.*, 148 F. 2d 276, 277 (C. A. 5, 1945), certiorari denied, 326 U. S. 728.

The Treasury has felt that the rationale of *Heininger* and *Longhorn Portland Cement Co.* is such that the attorney fee deduction is allowable for the unsuccessful defense of criminal anti-trust proceedings, apparently without regard as to whether there is any frustration of the public policy expressed in the Sherman Act. GCM 24377, 1944 Cum. Bull. 93; see also GCM 24810, 1946 Cum. Bull. 55. (Attorney fees deductible in unsuccessful defense of civil actions of O. P. A. regulations providing for treble damages.) But in the Treasury's position, the penalty itself remains undeductible.

However, if frustration of national or state policies evidenced by governmental statutes is the proper touch-

stone of non-deductibility, there can be no relevant distinction, as already observed, between the fines and penalties imposed and the legal expenses incurred in an unsuccessful defense to prevent their collection. To allow one and not the other is completely unwarranted.

f. Necessary Public and Private Wrongs.

Another inexplicable aspect of the fine or penalty situation lies in the strained observations that "the law will not recognize the necessity of engaging in illegal courses in the conduct of a business" (*National Outdoor Advertising Bureau, Inc. v. Helvering*, 89 F. 2d 878, 881 (C. A. 2, 1937) referring to *Burroughs Building Material Co. v. Commissioner*, 47 F. 2d 178 (C. A. 2, 1931) (Fines and attorney fees for violations of state price fixing laws)); and that it "cannot be that Congress intended the carrier should have any advantage, directly or indirectly, or any reduction, directly or indirectly, of these penalties." *Great Northern Ry. Co. v. Commissioner*, 40 F. 2d 372, 373 (C. A. 8, 1930), certiorari denied, 282 U. S. 855, (Penalties assessed on railroad for violations of Safety Appliances Act and Hours of Service Law, which arose in connection with the operation of the road).

Complicated and involved statutes and regulations present a common hazard in today's ordinary business life. Violations become a common business risk and penalties incurred in the ordinary course of business a normal cost of doing business. Thus, a partial recognition of the complexities in which the business world operates has been recognized in the line of cases holding that payments to the government for good faith unintentional violations of the Emergency Price Control Act are deductible (*Jerry Rossman Corp. v. Commissioner*, 175 F. 2d 711 (C. A. 2, 1949); *National Brass Works, Inc. v. Commissioner*, 182 F. 2d 526 (C. A. 9, 1950); *Pacific Mills v. Commissioner*, 207 F. 2d 177 (C. A. 1, 1953)), although they cannot be treated as deductible expenses if the violations were in-

urred deliberately or were avoidable. *George Shaefer & ons, Inc. v. Commissioner*, 209 F. 2d 440 (C. A. 2, 1954); *alia v. Commissioner*, 226 F. 2d 695 (C. A. 7, 1955), rtiorari denied, 350 U. S. 934; *National Brass Works, c. v. Commissioner*, 205 F. 2d 104 (C. A. 9, 1953). Even nder this view, there was no rational reason for the courts low to disallow the fines for the admittedly unintentional d inadvertent violations of the weight laws of the states her than Pennsylvania and New Jersey, where the vio- tions took place despite every precaution that could asonably be required of a prudent motor carrier to com- y with the weight limitations involved (R. 134a).

But the judicial dichotomy on deliberateness or avoid- nility in the role of preventing "frustration" cannot be stified by the numerous decisions where the courts have epeatedly held that a taxpayer may deduct damages paid a private person because of a wrong or tort committed the operation of his business. Penalties for such private rongdoing are just as unnecessary and avoidable, and the rongs may have been committed with as much wilfulness nd deliberateness as those involved or pertaining to public rongdoing. The deduction of the expenses of the former rustrates the public policy expressed in numerous state atutes as much as the deduction of the fine imposed by governmental body, where there is deliberate, intentional r other tortious conduct. Nevertheless, the courts have onsidered it immaterial whether the injury was caused y negligence, conspiracy, misrepresentation, conversion or iolation of a statute. *James E. Caldwell & Co. v. Com- issioner*, 234 F. 2d 660 (C. A. 6, 1956) (Milking and dis- pating corporate assets by conspiracy and fraud); *Becker ros. v. United States*, 7 F. 2d 3 (C. A. 2, 1925) (Infringe- ent of patent); *Helvering v. Hampton*, 79 F. 2d 358 (C. A. , 1935) (Fraud); *Anderson v. Commissioner*, 81 F. 2d 457 (C. A. 10, 1936) (Negligence resulting in death); *H. M. Howard*, 22 B. T. A. 375 (1931) (Misrepresentation and

conspiracy); *W. R. Harvey*, 25 B. T. A. 1282 (1932) (Violation of usury laws); *International Shoe Co.*, 38 B. T. A. 81 (1938) (Conspiracy); *Robert S. Farrell*, 44 B. T. A. 238 (1941) (Unlawful acts as director); *William Ziegler, Jr.*, 5 T. C. 450 (1945). (Mismanagement of corporation); *Dixon Fagerberg*, 1942 P-H. B. T. A. Memo. Dec. § 42,091 (Conversion of corporate assets).

In *Helvering v. Hampton*, 79 F. 2d 358, 360-361, (C. A. 9, 1935), the Court of Appeals said, "We cannot agree that private wrongdoing in the course of business is extraordinary within the meaning of the taxing statute allowing deductions for 'ordinary and necessary expenses'. The statute itself makes no exception . . . even if unethical conduct in business were extraordinary, restitution therefor is ordinarily expected to be made from the person in the course of whose business the wrong was committed." Similarly, public wrongdoing in the nature of violations of state statutes is not extraordinary within the meaning of Section 23(a)(1)A, and the fine legally and lawfully required to be paid for the transgression surely is not.

Furthermore, attempting to distinguish between penalty for a public wrong and restitution for a private wrong has led the courts into an insoluble maze. In *Standard Oil Co. v. Commissioner*, 129 F. 2d 363, 371 (C. A. 7, 1942), the Court finds the line of demarcation shadowy between deductibility of private and public tort judgments, yet believed it tolerably safe to say that torts committed against the government which are also violative of the criminal statutes may not furnish the basis of a tax deduction. The tort suit was brought by the United States to collect restitutionary damages for oil taken in the Teapot Dome scandals. The Court in *Foss v. Commissioner*, 75 F. 2d 326 (C. A. 1, 1935) saw a distinction which the Second Circuit in *National Outdoor Advertising Bureau, Inc. v. Helvering*, 89 F. 2d 878, 881 (1937), could not, between the unsuccessful defense of a suit by a minority shareholder to

enjoin the unlawful conduct of the taxpayer and a suit brought by the Sovereign. The Treasury could see this distinction, unobserved by the Second Circuit, when it ruled that amounts paid on account of actions instituted or proposed to be instituted for violations of the Emergency Price Control Act, when the violations were not wilful or the result of failure to take practical precautions to prevent their occurrence, were deductible if paid to the consumer, but not if paid to the United States. IT 3627, 1943 Cum. Bull. 111; IT 3799, 1946-1 Cum. Bull. 56. On the other hand, the Treasury made no moment as to any distinction based on suit being brought by the government rather than a private person when it ruled that amounts paid as liquidated damages by an employer to the United States under the Walsh-Healey Public Contracts Act (49 Stat. 2036) with respect to minimum wage and overtime violations were deductible for tax purposes, but not if paid with respect to child labor violations. I. T. 3894, 1948-1 Cum. Bull. 28.

In addition, not only is it fictitious to attempt to differentiate between public and private wrong on the ground of public or private party plaintiff, but any reliance that the distinction finds basis in a "restitution" concept as opposed to "penalty" can find no support in the non-deductible settlement involved in *Standard Oil Co. v. Commissioner*, *supra*, which was the fair equivalent of the loss sustained, or in the deductible innocent OPA violation payments made to the United States in *National Brass Works, Inc. v. Commissioner*, 182 F. 2d 526 (C. A. 9, 1950) where the Court, in finding such a distinction between restitution and penalty of no merit said (p. 530): "However, if we had to decide the nature of the damage payments to the government under Section 205(e), we would liken them to penalties for the reasons expressed in *Porter v. Montgomery*, 3 Cir., 1947, 163 F. 2d 211. We doubt that Section 205(e) was in any respect intended to provide for restitution."

Moreover, the deduction of damages imposed for tort reduces and mitigates the sanction imposed on the tort-feasor for the wrongful conduct as much, if not more, than the deduction of a fine or penalty. The respondent himself, on occasion, has argued against any such distinction and has contended that in both cases public policy is equally involved and violated. See *Helvering v. Hampton*, 79 F. 2d 358, 359 (C. A. 9, 1935); *International Shoe Co.*, 38 B. T. A. 81, 95 (1938). Furthermore, petitioner reads this Court's opinion in *Heininger* to eradicate any distinction between public and private wrongs in connection with the deductibility of legal fees involved in unsuccessful defenses. At 320 U. S. page 472 the opinion states, "Surely the expenses were no less ordinary or necessary than expenses resulting from the defense of a damage suit based on malpractice, or fraud, or breach of fiduciary duty. Yet in these latter cases legal expenses have been held deductible without regard to the success of the defense." Hence, as the Second Circuit, in referring to the fact that the fines involved in *Great Northern Ry. Co. v. Commissioner*, 46 F. 2d 372 (C. A. 8, 1930), certiorari denied, 282 U. S. 855, were for violations of a kind which were not infrequent, were inevitable in any large railroad system and for that reason may reasonably be allowed as ordinary and necessary expenses of the business, stated in *Burroughs Building Material Co. v. Commissioner*, 47 F. 2d 178, 180 (C. A. 2, 1931), "It is not easy to distinguish such fines from expenditures incurred in connection with actions to recover for negligence or because of patent infringements, *unless one draws an arbitrary line* between criminal and civil actions, even where the criminal actions relate to matters involving no moral turpitude." (Italics supplied.) It should be observed that this thought is the very rationale of the latter ruling of the respondent allowing the deduction of fines incurred and paid by motor carriers for violations of the maximum weight laws of the states during the period 1942-1950 (App. 9a-12a).

But, there is no justification for the drawing, as implied in *Burroughs Building Material Co. v. Commissioner*, *supra*, of any "arbitrary line." If any line is to be drawn in the public policy field, it must be a rational one and then drawn not by the judiciary, but by the proper legislative authority. This Court's opinion in *Textile Mills Securities Corp. v. Commissioner*, 314 U. S. 326 (1941) is not opposed to this conclusion. There this Court recognized that the "words 'ordinary and necessary' are not so clear and unambiguous in their meaning and application as to leave no room for an interpretive regulation" (p. 338) and that the general policy indicated by cases condemning contracts to spread insidious influence through legislative halls "need not be disregarded by the rule-making authority in its segregation of non-deductible expenses" (p. 339). Hence, a regulation which barred the deduction of amounts spent for "lobbying" as ordinary and necessary expenses was sustained, in the absence of any indication that such a course contravened any congressional policy, since a line could be drawn "between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction" (p. 339). The regulation made no mention of public policy and did not distinguish between legitimate lobbying contracts and the illegitimate variety. It determined rather that lobbying expenses, regardless of their nature, are not deductible ordinary and necessary expenses, and this Court found it immaterial whether the precise arrangement there in question would have been condemned under the case law.

In the case at bar, however, there is neither absence of indication of contrary congressional policy nor presence of any interpretive regulation applicable to the instant fines and penalties. In fact, the regulations recognize an aspect of the problem when they expressly provide that "Penalty payments with respect to federal income taxes, whether on account of negligence, delinquency or fraud are not de-

ductible from gross income." Treas. Reg. 111, Sec. 29.23(a)-1. This provision was put into the regulations, possibly as a result of *U. S. v. Jaffray*, 97 F. 2d 488 (C. A. 8, 1938), affirmed on another ground, 306 U. S. 276 (1939), which pointed up the previously changing position of the Treasury on the point. The Treasury was aware of *Great Northern Ry. Co. v. Commissioner*, *supra*, and *Burroughs Building Material Co. v. Commissioner*, *supra*, yet made no attempt to add their rule to the regulation at the time the provision dealing with penalties for federal tax violations was added. See G.C.M. 11358, XII-1 Cum. Bull. 29 (1933). If the Treasury did not, there is no reason for the courts to do so.

g. Activity in Violation of State Law.

If "frustration of state legislative policies proscribing particular types of conduct" can be a proper basis for non-deductibility, there can be no logic in disallowing the fines for the overweight violations presented here without similarly attacking the motor vehicle expenses, depreciation and salaries paid in the commission of the so-called unlawful activity of operating the overweight vehicles. Surely all are equally dedicated to the activity which, under the view of the respondent and the courts below, the states seek to prevent. And similarly, if there can be deducted the integral unlawful expenses of an illegal business, morally wrong and socially condemned (*Commissioner v. Doyle*, 231 F. 2d 635 (C. A. 7, 1956); *Sullivan and Ross v. Commissioner*, 241 F. 2d 46 (C. A. 7, 1957); *Mesi v. Commissioner*, 242 F. 2d 559 (C. A. 7, 1957) (writs of certiorari granted to the Court of Appeals for the Seventh Circuit)), the transgressions of a socially desirable legitimate business cannot properly be singled out for tax punishment by the disallowance of expenses, otherwise ordinary and necessary, which may be incidental thereto.

The culmination of this type of confusion and chaos is the emasculation of the statutory test of "ordinary and

necessary". This finds expression in the address of Attorney General Herbert Brownell to the American Bar Association annual meeting on August 27, 1953. The Attorney General stated (78 ABA Rep. 334, 338 (1953)):

> "It seems anomalous that a person engaged in a business which is admittedly illegal may take a deduction for 'ordinary and necessary expenses' incurred in the business. As either a legal or practical matter, I can see nothing ordinary or necessary in expenses incurred in long distance telephone calls made to place bets or make layoffs; automobile expenses for collecting numbers or delivering dope, rent for houses used for gambling, or other vice. But, even if they are "ordinary" expenses, there is certainly nothing 'necessary' about them.
>
> "Our policy in the Department will henceforth be to disallow all deductions for expenses incurred in illegal enterprise, and the Treasury Department has promised us its fullest cooperation."

Although the Attorney General was speaking in the context of "professional criminals," the policy proposed, with which the Treasury will fully cooperate, is to use the tax laws, not only for revenue purposes, but also for suppression of local crime by disallowing "all deductions for expenses incurred in illegal enterprise." When lawful business transgresses the law, it is a short step for respondent, unless checked, to separate lawful from unlawful activity and cast the latter into the category of "illegal enterprise." And the step is short because the public policy doctrine has been allowed to erode the plain meaning of Section 23(a)(1)A.

The cases are replete with illustrations of this erosion. Not only are they floundering in the quicksand of public policy, but they have reached the point, apparently without regard to public policy, that the words "ordinary and

missioner, supra demonstrate that otherwise ordinary and necessary expenses, even of an illegal business, are to be given income tax recognition, even though the payments made in and of themselves be illegal and wrongful under state statute, and even though the allowance of any expenses to such illegal business mitigates against the state statute forbidding the business enterprise itself. In the instant case, there was nothing morally wrong or illegal in and of itself for the petitioner to pay the fines directly imposed on it by New Jersey and the other states, and in Pennsylvania there has been no contention, as indeed no meritorious one could be advanced, that the union negotiated contracts obligating petitioner to indemnify and reimburse its drivers for the Pennsylvania fines imposed on the drivers operating the overloaded vehicles, were illegal or even approached that "family of contracts to which the law has given no sanction." Hence, moral turpitude, illegality, and the like, whatever their relevance in other cases, constitute no barrier to the deductions sought here.

"Frustration" thus looms in paramount importance, but, as already observed, the expenses lawfully and legitimately incurred by petitioner in operating its overweight vehicles were as directly connected with the overweight violations as the fines imposed. The logic of the Attorney General's position is inescapable, once his unsound premise is accepted that a purpose of the Revenue Act is to suppress crime. It may be paraphrased as follows: Disallow the illegal expenses of an illegitimate business; they frustrate public policy. Then disallow the legitimate expenses also; they frustrate public policy by allowing the illegitimate business tax recognition. Then separate the transgressions of a legal business and give them no tax deductibility recognition. Tax gross instead of net income.

h. *Abandonment of Public Policy Test.*

"Moral turpitude is not a touchstone of taxability." *Commissioner v. Wilcox*, 327 U. S. 404, 408 (1946); "The

1916 Amendment omitting the word "lawful" before the word "business" in the definition of gross income demonstrated an intent to include gains, profits and income from any unlawful business as well as from any lawful business. It is inescapable evidence of a like intent to include unlawful as well as lawful 'gains . . . from any source whatever'." *Commissioner v. Wilcox, supra*, at 411. See *U. S. v. Sullivan*, 274 U. S. 259 (1927). Cf. *Rutkin v. U. S.*, 343 U. S. 130, 141 (1952). But the tax laws do not "penalize illegal business by taxing gross instead of net income." *Commissioner v. Heininger*, at 474. "By the broad definitions of gross income, income arising from an illegal business is taxed even though the illegality be one declared by the Constitution itself. . . . The provisions of the statute fixing the deductions to be regarded in arriving at net income which alone is taxed . . . are as broad and unqualified as those defining the taxable gross income." *Alexandria Gravel Co. v. Commissioner*, 95 F. 2d 615, 616 (C. A. 5, 1938). Whatever vitality may still exist in the restrictive interpretation that allowance of a deduction "depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed" (*New Colonial Ice Co., Inc. v. Helvering*, 292 U. S. 435, 440 (1934)), in view of the treatment afforded this rule in *Lykes v. U. S.*, 343 U. S. 118, 120 (1952) (footnote 4), it is the respondent and the lower courts which have ignored the "clear provision" of the ordinary and necessary business expenses here involved by reliance on the extra-statutory concept of public policy. It may shock the conscience of many to find an otherwise reputable businessman in violation of law, but this does not justify applying the alien concept of public policy in the almost mathematical computation of net income. A taxpayer cannot deny his receipt of income on the ground it resulted from illegal transactions; but neither should the respondent be permitted to find the existence of taxable income where there is none merely on the ground of some public policy.

ness deductions, which policy was unchanged by congressional amendments to the Internal Revenue Code during this period, and that he was in error in revoking it by his November 30, 1950 ruling (App. 12a). The place of the fine in the Pennsylvania weight law, being imposed on the employee-driver, and the studied enforcement policy of the Pennsylvania authorities to accept the fine and allow the vehicle to continue overloaded without requiring that the excess load be removed, indicates that the factual premise on which respondent's earlier deductible ruling was based continued to be present in Pennsylvania in the taxable year. If the fine were really a revenue or remedial measure, as petitioner claims it was, there can be no serious question as to its deduction not frustrating any sharply defined Pennsylvania state policy.

In this connection, the Tax Court observed that it was highly doubtful whether Pennsylvania would have granted a permit to a bulk liquid motor carrier to exceed the permissible limit (126a, 131a), and respondent may seek to draw some comfort from this observation. However, the fact that a permit would or would not have been granted in Pennsylvania had petitioner or the other carriers sought one for each overloaded vehicle is completely beside the point. What is important is, as respondent himself had recognized in his earlier ruling, that where continued operation of the overloaded equipment on the highways is freely permitted, either by way of payment of fine, or by way of permit, the cost of such continued operation, in the form of fine or permit, is a deductible business expense, which does not frustrate any sharply defined policies of the weight limitation laws.

Hence, the payment in the form of a fine does not per se outlaw the deduction. All the facts in the instant case pertaining to the scheme of the fine in the enactment and enforcement of the Pennsylvania weight law lead to the conclusion that it was a remedial measure to compensate

This has been partly recognized, over respondent's strenuous objections, in the fictitious distinction which is said to exist between the determination of gross income, on the one hand, and deductions allowed to the taxpayer, on the other. Illegal payments, such as those in excess of O. P. A. ceiling prices, and kickbacks on the selling price in violation of state statutes, must be recognized in the computation of gross income as part of the cost of goods sold or as a reduction of gross receipts, despite the fact that public policy is flouted as much in these instances as in the cases heretofore holding that illegal payments are not deductible as ordinary and necessary business expenses. *Hofferbert v. Anderson Oldsmobile, Inc.*, 197 F. 2d 504 (C. A. 4, 1952); *Pittsburgh Milk Co.*, 26 T. C. 707 (1956). The whole distinction between gross income and net income seems rather artificial and unnecessary, at least in this field. When it is considered that the clear purpose of income tax law is to tax net, rather than gross income, even though the technical arrangement of the various statutory provisions permits an argument that gross income and net income require a different approach, the observation that deductions are a matter of legislative grace does not seem helpful or meaningful to justify disregarding the illegal payments. The deductions at least are not a matter of judicial grace. Hence, it is not surprising that the respondent has argued "that the distinction between deductions and cost of goods is lacking in significance, is tenuous and diminishes tax liability, unless the distinction is wiped out or disregarded." *Commissioner v. Weisman*, 197 F. 2d 221, 224 (C. A. 1, 1952). And the courts paying lip service to the difference frankly admit that "'in some instances this distinction is clear; in other cases, particularly as to manufactured goods, the distinction is often technical and economically obscure.'" *Hofferbert v. Anderson Oldsmobile, Inc.*, 197 F. 2d 504, 506 (C. A. 4, 1952).

Petitioner agrees that the distinction should be wiped out and that the only consistent and realistic approach is to disregard illegality, immorality, and public policy as such and determine tax liability on the basis of the taxpayer's true commercial net income, however it is produced. In arriving at that income, there should be allowed as exclusions or deductions all costs and expenses ordinarily and necessarily incurred in the production of that income. See *McDonald v. Commissioner*, 323 U. S. 57, 66 (1944). That is, the cost and expense which is so clearly interwoven in the fabric of the business as to make fictitious any net income figure computed without regard to them.

This seems to be the general approach taken by the Seventh Circuit in the *Doyle*, *Ross*, *Sullivan* and *Mesi* cases, with its emphasis that "ordinary and necessary" expenses mean "those expenses which economically are an integral part of a business, whether it be lawful or not," (*Commissioner v. Doyle*, 231 F. 2d 635, 637 (C. A. 7, 1956)), although some dicta in the *Doyle* case, placing fines and penalties imposed for violation of federal or state statutes in the nondeductible concomitant class, suggests that the Court would hesitate to carry through on its convictions. *Commissioner v. Doyle*, *supra*, at 637. The expenses incurred by petitioner for the gas, oil, salaries, depreciation, and fines were unquestionably, in Pennsylvania, economically interwoven in the production of over two-thirds of petitioner's income derived from activities in that state (R. 120a). As the Court of Appeals said in the *Heininger* case, "Without this expense, there would have been no business. Without the business, there would have been no income. Without the income, there would have been no tax. To say that this expense is not ordinary and necessary is to say that that which gives life is not ordinary and necessary." *Heininger v. Commissioner*, 133 F. 2d 567, 570 (C. A. 7, 1943).

Of course, abandonment of a public policy test which uses the deduction provision as a medium for judicial ex-

for alleged damage to the roads, allowing the carriers the right to proceed with their overweight vehicles on the Pennsylvania highways without further interference.

Finally, as previously noted, the frustration of not every alleged, vague or inarticulate policy, evidenced by state statute, will deny deductibility of violative fines as ordinary and necessary business expenses. It is only the frustration of "sharply defined" policies. *Lilly v. Commissioner*, 343 U. S. 90 (1952); *Commissioner v. Heininger*, 320 U. S. 467 (1943). The clearly defined policies and underlying purposes of the weight laws of other states are not involved. The fine in the Pennsylvania scheme of enforcement was neither, in fact or intention, punishment for past nor a deterrent to future overweight violations. It was imposed as a remedial measure to cover restitution for supposed damage to the highways of the state. The discriminatory and restrictive limitations were recognized and removed for the future by legislation which, although it was subsequent to the taxable year, nevertheless confirmed previous enforcement policy content to take the fine without removal of the excess load, and to allow the vehicles to continue enroute with weights conforming to those allowed in the neighboring states.

It is, therefore, submitted that petitioner's payments of the Pennsylvania fines imposed on its employee-drivers, pursuant to union negotiated contracts substantially similar to those existing for the other carriers in the industry and placing this obligation on taxpayer, were deductible as ordinary and necessary business expenses.

b. *New Jersey*

In the seven instances for which petitioner was fined in New Jersey, petitioner's vehicles, although they were under the 60,000 pound limit otherwise permissible in New Jersey, were in excess of the considerably lower Pennsylvania limit permitted by Pennsylvania law and were, there-

fore, in violation of the reciprocity provision of the New Jersey law (119a, 133a).

The reasons advanced by the courts below for non-deductibility of the fines were that the New Jersey violations were just as deliberate as the ones occurring in Pennsylvania itself and that New Jersey had undertaken to accommodate its penal provisions to those of Pennsylvania, making it a criminal offense to operate Pennsylvania vehicles on the New Jersey roads which exceeded the lower Pennsylvania limit (R. 133a, 141).

The Tax Court did not know why New Jersey did this and neither it nor the Court of Appeals attempted to indicate how the allowance of the deduction for the New Jersey reciprocity violations would in any way frustrate the sharply defined policies of either the Pennsylvania or New Jersey state law. This further indicates that the courts below were content to deny the deduction on the mere finding that the payment was a fine.

It is submitted that this is error and frustration, which at least must be present to deny deductibility, cannot be shown.

No policies of the Pennsylvania statute would be offended by the operation of vehicles bearing a Pennsylvania license registration on the highways of another state. At best the Pennsylvania weight limitation is designed to protect roads and highways within the state of Pennsylvania. It is not a home port measure, designed to prescribe rules of conduct for the operation of so-called Pennsylvania equipment in the surrounding states of the United States. Nor should it be said that New Jersey, by its reciprocity provision, attempted to help other states effectively police their own weight laws, when the other states did not do likewise for New Jersey.

Similarly, since New Jersey recognized a 60,000 pound legal weight, no sharply defined public policy to protect New Jersey roads or highways was offended by the opera-

pression of moral attitudes, does not mean that all sorts of illegal and immoral expenses would automatically become deductible. The proper statutory criterion of "ordinary and necessary" as interpreted by this Court would still allow most of the objectionable payments which have troubled respondent and the courts to be disallowed. Where it is not "ordinary" in the particular business to give bribes, the courts could still strike down the deduction without regard to public policy. Or payments for political favors may be denied deductibility because others in the business do not consider them necessary. *Rugel v. Commissioner*, 127 F. 2d 393 (C. A. 8, 1942) (Payments to an influential party precinct captain in order to obtain a state printing contract); *Hardee Mortgage Loan Co. v. Commissioner*, 137 F. 2d 282 (C. A. 10, 1943) certiorari denied, 320 U. S. 791 (Payments for exerting political influence made under the guise of selling commissions on road building materials); *Excelsior Baking Co. v. U. S.*, 82 F. Supp. 423 (D. Minn., 1949) (Sums surreptitiously paid to disreputable men to negotiate a labor contract). If it were possible that a taxpayer could show that certain bribes and rigged fines were ordinary, necessary and customary for his illegal business, which would not properly be classified as payments for good will, they should be deductible, but the problems of proof would be formidable and the cases so few as to be insignificant. See *Charles A. Clark*, 19 T. C. 48 (1953); *Automatic Cigarette Sales Corp. v. Commissioner*, 234 F. 2d 875 (C. A. 4, 1956) certiorari denied, 352 U. S. 951. But fines are natural, customary, ordinary, and unavoidable in such lawful businesses as taxicab operations and the truck operations of the instant case.

This approach gives no advantage to the illegitimate over the lawful enterprise, as seems to worry respondent at page 14 of his petition for certiorari in the *Sullivan*, *Ross*, and *Mesi* cases. So long as net income is the denominator of taxability, each type of business is separately to be examined. "Normalcy in the particular business" is the

tion of petitioner's Pennsylvania licensed vehicles within such a weight limitation in New Jersey.

Hence, on its face, the role of the fine in the scheme of enforcement of the New Jersey reciprocity provision would seem to be either a revenue measure or as a retaliatory measure directed not against petitioner or the other carriers in the industry, but possibly against the policy of the state of Pennsylvania in imposing its restrictive weight law to New Jersey registered vehicles on the highways of Pennsylvania. Then, the purpose of the fine could be said to be to alleviate the burden which was placed on New Jersey motor vehicles fined in Pennsylvania, by shifting some of the cost of maintaining the New Jersey highways to the Pennsylvania vehicles exceeding in New Jersey the Pennsylvania maximum weight. In any event, however, New Jersey was not concerned in any way in using the fines as a sanction to punish or deter the operation of equipment therein bearing a maximum weight of under 60,000 pounds.

c. Other States.

The record indicates that the payments of fines in the other neighboring states in and through which petitioner's vehicles operated pertained to violations which were neither wilful nor negligent, and that the fines were incurred despite every precaution that could fairly be demanded consistent with a practical operation of the business (R. 122a-123a, 127a, 134a).

Here again, the allowance of a deduction for the payments of fines incurred despite the exercise of appropriate care would not frustrate any sharply defined policies of the applicable state weight limitation laws. It may well be, as was pointed out by the District Court in *Hoover Motor Express Co., Inc. v. U. S.*, 135 F. Supp. 818 (D. C. Tenn., 1955) aff'd 241 F. 2d 459 (C. A. 6, 1957) certiorari granted that the purposes of the state weight limitation laws to protect the highways of the state and the persons using them could be accomplished more effectively by treating wil-

proper test (*Deputy v. duPont*, 308 U. S. 488, 496 (1940)), not that it conforms to the standards of the business community as a whole, as respondent has attempted to suggest in his rulings on deductible kickbacks. See I. T. 4006, 1952-2 Cum. Bull. 91; Rev. Rul. 54-27, 1954-1 Cum. Bull. 44. This means that the fines involved in the instant case, arising from customary, normal overweight operations necessary to petitioner's continued business life, meet the statutory standard. Each case must be examined ad hoc. See *Jerry Rossman Corp. v. Commissioner*, 175 F. 2d 711, 713 (C. A. 2, 1949). "... where the benefit claimed by the taxpayer is fairly within the statutory language and the construction sought is in harmony with the statute as an organic whole, the benefits will not be withheld from the taxpayer ..." *Lengt Corporation v. Commissioner*, 349 U. S. 238, 240 (1955).

The tax laws are to be interpreted so as to have a uniform application in the states of the United States. *Burnet v. Harmel*, 287 U. S. 103, 110 (1932); *U. S. v. Pelzer*, 312 U. S. 399, 402 (1941). "Were it not so, federal tax legislation would be the victim of conflicting state decisions on matters relating to local concerns and quite unrelated to the single uniform purpose of federal taxation." *Estate of Rogers v. Commissioner*, 320 U. S. 410, 414 (1943). State laws vary far too much in their scope and operation to allow the "single uniform purpose" of taxing commercial net income to be dependent on state whim or to justify federal interference "into fields of law enforcement heretofore wholly left to states and local communities." *Rutkin v. U. S.*, 343 U. S. 130, 141 (1952). One state may require a higher license fee for a permit, another state a fine for continued uninterrupted operation of a motor vehicle bearing the same weight. Under the view of the respondent and the courts below, payment of the former would be deductible, the latter not. Business necessity having widespread legislative acceptance could thus result in tax discrimination by legislative semantics. Despite minor differences, all the

ful, on the one hand, and innocent or non-negligent violators, on the other hand, alike; and that neither hardship nor good faith nor appropriate care constitutes a defense to the state violation.

But the issue in the instant case is not whether there was a violation. It is whether the allowance of the deduction for the payments of fines imposed for the inadvertent violation frustrates the deterring or punishing aspects of the state statutes. Pitched at this level, it matters not, as the Court of Appeals erroneously believed, that the weight laws make no express distinction between innocent and wilful violators (R. 140-141).

If the enforcement provisions of the respective statutes could effectively be applied, a wilful violator must, to the extent there is a purpose to punish or deter, be placed in a different category from the good faith, non-negligent, innocent violator. It may well be that in the scheme of enforcement by local police authorities before justices of the peace or minor judiciary, it would embroil effective enforcement in a morass of litigation to determine ad hoc in each case whether or not the operator of the motor vehicle or the company owning it, knew or should have known that it was overweight at the time it started in transit. For this reason, justification can be found in the imposition of the fine on the innocent and wilful violator alike. But this in no way means that the innocent violator should be doubly punished, and must be treated the same as the wilful violator for every and all collateral purpose. He has already incurred the expense of the fine through no fault of his own, and it serves no purpose to cause him to lose more revenue by refusing the deduction under the income tax laws. There are "penalties and penalties," and there is no reason why the tax laws cannot recognize the unfortunate position in which the innocent and inadvertent violator found himself without defeating in any way the real purposes of the state statutes.

states know how and when to take care of and prevent real threats to the use and safety of the highways. This Court has not been persuaded "that the conventional forms of punishment are inadequate to protect states from overweighted or improperly loaded motor vehicles," (*Castle v. Hayes Freight Lines*, 348 U. S. 64 (1955)) to justify use of the revenue act "as an arm of the law to enforce State criminal statutes by augmenting punishment which the State inflicts." *Burroughs Building Material Co.*, 18 B. T. A. 101, 105 (1929).

Wrongdoers should be punished directly for their sins, and the way is for the appropriate state enforcement officials to do the job, putting the burden of punishment where it belongs and not on the tax system. Aside from the constitutional problems which would come to the fore if Congress undertook to use the federal power to tax income to supplement the police power of the state over criminal law enforcement, by expressly disallowing as deductions ordinary and necessary expenses in violation of state statutes or incidental thereto (*see U. S. v. Constantine*, 296 U. S. 287 (1935); *U. S. v. Kahriger*, 345 U. S. 22 (1953) indicating that a federal tax which is actually a penalty for violation of state law infringes on the Tenth Amendment), the public policy test of the courts below places socially harmless individual violations of unpopular or anachronistic legislation on a par with organized criminal activity. The Seventh Circuit noted in *Commissioner v. Doyle*, 231 F. 2d 635, 638, that one state, such as Pennsylvania actually does today, may prohibit the business of selling automobiles on Sunday or the sale of intoxicating liquor at retail, while another may not. To the extent that ordinary and necessary expenses exist in this similar activity, a holding that they are not deductible in the one state where the business activities were unlawful would mean that such a tax would be levied by the federal government on gross income, whereas a holding that they are deductible in the other states would mean that such a tax would be levied on only

Accordingly, petitioner contends that its innocent and inadvertent violations in the other states were of sufficient frequency in the industry and arose from conditions applicable to the industry as a whole, to constitute the payments of the fines for the violations thereof, ordinary and necessary business expenses, for which the deduction would in no way frustrate any sharply defined policies evidenced by the state weight limitation laws. . . .

CONCLUSION.

The decision of the Court of Appeals should be reversed and the payments by petitioner of the fines pertaining to the state of Pennsylvania, to the state of New Jersey and to the other states should, in all three instances, be deductible as ordinary and necessary business expenses.

Respectfully submitted.

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t income. Certainly the clear language of Section (a)(1)A does not suggest that the Congress contemplated intended such an inequitable consequence to be reached hen payments are incidental to an infraction or violation state statutes having no purpose to suppress crime, but erely the objective of prohibiting acts contrary to local otions of public policy. Unless checked, it can end with tax reaching the gross income of transactions in which ell-meaning taxpayers fail after every possible effort to omply with anachronistic statutes, such as the Pennsylania weight law in the taxable year 1951, designed to express a public policy alien to the complicated ways of the odern business world.

Accordingly, the amounts paid by the petitioner for the ate fines imposed on the overweight violations are deductle as ordinary and necessary business expenses.

I. Tax Deductions for the Payments in Connection with the Fines Would Not Frustrate Any Sharply Defined State Policies.

Even if certain expenditures otherwise ordinary and ecessary under Section 23(a)(1)A are not deductible if hey are penalties, the allowance of which would frustrate a harply defined national or state policy, it is petitioner's lternative contention that the payments which were made n connection with the three types of fines presented here re still deductible.

It should be noted that two separate questions thus merge under this alternative contention. One is whether he fine is, in fact, a penalty. If this is answered in the ffirmative, the second is whether its deduction for tax purposes would frustrate any sharply defined policy of the state tatute. This, in turn, depends upon the nature of the offense and the place of the sanction in the scheme of enforcement of the underlying act. As the court in *Jerry Hossman Corp. v. Commissioner*, 175 F. 2d 711, 713 (C.A.2,

1949), stated: "whether the claimed deduction be of legal expenses or of fines or forfeitures, its allowance depends upon the place of sanctions in the scheme of enforcement of the underlying act. We think that . . . [this] . . . is the right reading; in short that there are 'penalties' and 'penalties' and some are deductible and some are not".

There is no dispute that petitioner's overweight vehicles were subject to a fine imposed under a penal statute, taking the term "penal" in its broadest sense. But the tax sanction of non deductibility, when predicated upon "frustration" of "clearly defined state policies evidenced by some governmental declaration of them", does not automatically follow merely because something called a "fine" was properly imposed by state law. The non deductibility can still only be justified, first by identifying it, not with some state whim, but with a sharply defined, i. e., important and rational state policy that warrants the type of social condemnation that is or ought to be implicit in the concept of crime. Then the income tax deduction must clearly interfere with enforcement provisions of this type of state statute which are designed to punish past and deter future violations.

Hence, even under this "frustration" approach, federal tax deductions are not to be subject to the uncontrolled caprice of state legislation, as the Court of Appeals seemed to indicate when it said "Once it is concluded that the regulation is within the sphere of proper legislative action the courts [in a tax controversy] will not gainsay the legislature on just where the arbitrary line between allowable and proscribed weights should be drawn. Nor is it appropriate at this juncture to review state enforcement policies. Such must be the rule if there is to be any semblance of order on this and similar questions" (R. 140a). This is not a "frustration of public policy" analysis. Rather, it is a mistaken concept that once the fine is imposed by legislation which constitutionally falls within

APPENDIX

Vehicle Code of Pennsylvania
Act of May 1, 1929, P. L. 905 as Amended
(in effect in 1951)

719. *Special hauling permits* (75 Pa. Purdon Stat. § 308)

The fee for a special hauling permit shall be five ($5.00) dollars plus two (.02) cents for each ton of two thousand (2,000) pounds, or fraction thereof, of gross weight of vehicle, or combination of vehicles or vehicle and load, or combination of vehicles and their load or loads, in excess of the legal gross carrying capacity for which such vehicles or combination of vehicles have been properly registered, for each mile, or fraction thereof, of length of haul, payable to the authorities issuing such permit. The fee for cancelling an unused special hauling permit shall be one ($1.00) dollar, payable to and upon the approval of the authorities issuing the permit.

903. *Width of Vehicles and Loads* (75 Pa. Purdon Stat. § 453)

(g) No truck tractor and semi-trailer combined, except fire department equipment, shall be operated upon any highway with a gross weight in excess of forty-five thousand (45,000) pounds, or in excess of twenty thousand (20,000) pounds on any axle, or in excess of eight hundred (800) pounds on any one wheel for each nominal inch of width of tire on such wheel; axle or axles of semi-trailer shall not be less than ninety-six (96) inches from the axle of the truck tractor.

the police power of a state, the fine can never be deducted, regardless of the nature of the underlying offense and whether or not the deduction frustrates any sharply defined policy of the state statute. This Court's opinion in *Heininger* plainly shows the error of this.

a. Pennsylvania.

The role of the fine in the Pennsylvania statutory scheme of enactment and enforcement was not a penalty imposed on bulk liquid motor carriers for weight violations condemned in any real sense. As was pointed out in *Jerry Rossman Corp. v. Commissioner*, 175 F. 2d 711 (C. A. 2, 1949), a penalty (p. 172):

> Taken in its broadest sense . . . has a punitive, as opposed to a remedial meaning; it covers fines and other exactions which are not restitution for a wrong and are only justified, either as a deterrent, or in order to satisfy an atavistic craving for retaliation.

The fine imposed by Pennsylvania for operating the overweight vehicles was neither punishment for past nor a deterrent to future violations. The fine was imposed upon the individual driving the overloaded vehicle, and not on the owner (75 Pa. Purdon Stat. § 453; 14a-16a, 128a). In fact the owner of the vehicle cannot appeal the conviction of the employee-driver. Only the driver can so appeal. *Hadlock v. Lattavo Bros., Inc.*, 85 Pa. D. & C. 545 (1952).

But the employee-drivers of the motor vehicle, who alone were subject to the fines, were not in any way factually responsible for the weight of the load. This was the decision deliberately made by the petitioner and the other carriers in the industry. Hence, for the Pennsylvania legislature consciously to impose the fine on the driver and not, as do the weight laws of the other states, on the company actually responsible for the violation indicates a legislative purpose neither to punish past nor to deter future similar activity on the part of the carriers.

Penalty. Any person operating any vehicle or combination of vehicles upon any highway with a gross weight or with weight on any one axle or wheel exceeding by more than five (5) percentum the maximum weight allowed in that particular case and not exceeding by more than ten (10) per centum the maximum weight allowed, shall in each case, upon summary conviction before a magistrate, be sentenced to pay a fine of twenty five ($25) dollars and costs of prosecution, and in default of the payment thereof, shall undergo imprisonment for not more than five (5) days, and any person operating any vehicle or combination of vehicles on any highway with a gross weight or with weight on any one axle or wheel exceeding by more than ten (10) per centum the maximum weight allowed in that particular case, shall in each case, upon summary conviction before a magistrate, be sentenced to pay a fine of fifty ($50) dollars and costs of prosecution, and in default of the payment thereof, shall undergo imprisonment for not more than ten (10) days.

* * *

Officers may arrest vehicles and require removal of excess load (75 Pa. Purdon Stat. 454):

Any peace officer who shall be in uniform, and shall exhibit his badge or other sign of authority, having reason to believe that the weight of a vehicle or combination of vehicles and load is unlawful, is authorized to weigh the same, either by means of portable or stationary scales, or may require that such vehicle or combination of vehicles be driven to the nearest stationary scales in the event such scales are within a distance of two (2) miles. The peace officer may then require the operator to unload immediately such portion of the load as may be necessary to decrease the gross weight of such vehicle or combination of vehicles to the maximum gross weight specified in this act, except

In this connection, it should be noted that imprisonment of the driver is provided for only upon default in payment of the fine (75 Pa. Purdon Stat. § 453). Thus sentence of imprisonment is authorized, not as an immediate sanction, but rather to coerce the payment of the fine. In the history of the enforcement of the weight laws by the authorities charged therewith in Pennsylvania, no imprisonment, suspension of driving privileges or other sanctions were imposed on or exacted from the employee-drivers or the bulk liquid carriers, other than the fine (128a-129a). This indicates both an enactment and enforcement policy not to prevent continued operation of the overloaded equipment, a policy inconsistent with the concept of punishment for bad behavior.

Furthermore, although statutory provision was made for discretionary removal of the excess load (75 Pa. Purdon Stat. § 454), there also has been in the history of the enforcement of the statute, no instance known to the industry where the excess weight was required to be removed before the vehicle could continue on its original transit (44a-45a, 82a, 129a). This likewise demonstrates a studied enforcement policy, expressly delegated by the statute, to allow uninterrupted operation of the overloaded equipment upon payment of the fine only. Again, a concept inconsistent with strict penalty and punishment.

Moreover, the fine itself is imposed in one of two fixed amounts, and is not graduated above the maximum sum of $50.00 on the number of pounds of excess weight, or on the number of violations, as is true with real penalty provisions of the weight laws of other states and with the penalty provision of the new Pennsylvania weight law enacted in 1955 (75 Pa. Purdon Stat. § 453 (pocket part)).

Finally, the statutory disposition of the fines legislatively indicates that they were imposed as a remedial or compensatory rather than a punitive measure, to cover restitution for a supposed wrong, a concept inconsistent with

as herein provided for special permits: And further provided, That no arrests shall be made, or information brought in cases where the maximum gross weights provided in this act are not exceeded by more than five per centum thereof.

Penalty. Any person refusing to unload excess weight when so ordered or violating any of the other provisions of this section, shall, upon summary conviction before a magistrate, be sentenced to pay a fine of fifty ($50) dollars and costs of prosecution, and, in default of the payment thereof, shall undergo imprisonment for not more than five (5) days.

* * *

§ 905. *Permits for excessive size and weights.* (75 Pa. Purdon Stat. § 455)

(a) The Secretary of Highways of this Commonwealth, and local authorities in their respective jurisdictions, may, in their discretion, upon application in writing accompanied by the fee provided in this act, and good cause being shown therefor, issue a special permit, in writing, authorizing the applicant to operate or move either a vehicle or combination of vehicles, or a vehicle and load, or a combination of vehicles and their load or loads, of a size or weight exceeding the maximum specified in this act upon any highway under the jurisdiction of and for the maintenance of which the authorities granting the permit are responsible. When a permit has been issued by the Secretary of Highways, no other authorities shall require any further or additional permit for any portion of the route specified therein. Every such permit shall be issued for a single trip, and shall designate the route to be traversed, subject to such rules, regulations, restrictions, or conditions, as shall be deemed necessary by the authority granting such permit; Provided, That, upon request included in the application, a combination permit may be issued for a single continuous round trip, whether or not a load or loads may be transported for the entire trip, but no sub-

that of penalty. *Jerry Rossman Corp. v. Commissioner*, 175 F. 2d 711 (CA-2, 1949). Under the supposition that an overweight vehicle may work damage to the roads and highways, the Pennsylvania statute expressly required that the fines for operating overloaded vehicles within local municipalities be paid to and used by such municipality for the construction, repair and maintenance of its highways (132a, 75 Pa. Purdon Stat. § 737). See *A. L. I. Federal Income Tax Statute*, February 1954 Draft, Volume 1, Section x 165(i)(2) which proposes that fines or penalties imposed primarily for compensatory damage are deductible.

Hence, it is submitted that the Tax Court was in error in lifting out of context the characterization of the weight law as "penal". *Com. v. Burall*, 146 Pa. Super. 525, 529 (1942). Whatever circumstances might be present in some other state, where the penalty provisions could be said to have been enacted and applied to enforce obedience to prescribed weight limitations and to punish violators, no such purposes were present for the bulk liquid motor carrier industry in Pennsylvania in 1951.

The Court below observed in *McDonald v. Penna. Railroad Co.*, 210 F. 2d 524, 528 (1954) that there are two obvious reasons for the Pennsylvania weight limitation law. The first is that an overweight vehicle may work serious damage to a road and the second is that an overweight vehicle may be an obstacle to the free movement of traffic, thereby creating a traffic hazard. If the fines paid by petitioner were not to punish, nor deter, activities creating these results, the deduction of their payment for income tax purposes would not frustrate any sharply defined policies of the Pennsylvania weight law. See *The Tax Fortnighter*, Vol. 5, No. 12, which, in criticising the Tax Court opinion below, suggests (p. 685) that Pennsylvania employed a "fining" procedure in lieu of tolls as a matter of understandable expedience and cloaked a "remedial" statute in penal form.

stantial increase in the size or weight of vehicle or combination of vehicles or of load shall be made between intermediate points without supplemental permit. The Secretary of Highways may, in his discretion, issue a single permit for any fixed number of movements across the highway of vehicles or combinations thereof exceeding the maximum size or weight specified in this act at specified locations. Whenever any such permit shall have been issued for crossing the highway, it shall be unlawful to move said vehicles along the highway. The movement of any vehicle or load requiring a permit shall impose the obligation on the permittee to restore or replace any section of highway or bridge damaged as a result of such movement, whether or not such damage may be attributable to negligence on the part of the permittee. Every such permit shall be carried in the vehicle to which it refers, and shall be open to inspection by any peace officer or employe of the Department of Highways of this Commonwealth or to any person having collision with or suffering injury from such vehicle.

* * *

Penalty.—Any person operating or moving a vehicle or load of a size or weight exceeding the maximum specified in this act, without first having obtained a permit or permits so to do, and any person altering or forging a special permit for excessive size and weight, or presenting or exhibiting an altered or forged special permit for excessive size and weight, shall, upon summary conviction before a magistrate, be sentenced to pay a fine of fifty ($50) dollars and costs of prosecution, and, in default of the payment thereof, shall undergo imprisonment for not more than ten (10) days.

* * *

1207. *Disposition of fines and forfeitures* (75 Pa. Purdon Stat. § 737)

(a) All fines and penalties collected under the provisions of this act for violations of the same, and all bail

The enforcement of the maximum weight provisions by the officers charged with this responsibility, just as was true with the Price Administrator in *Jerry Rossman Corp. v. Commissioner*, points up the fact that there was no important policy underlying the Pennsylvania weight law which would be frustrated by the allowance of the income tax deduction for the amounts of the fines. Although it is unquestioned that, unlike *Rossman*, petitioner and the industry consciously knew that their vehicles were overweight in Pennsylvania when filled to capacity with anything but gasoline, nevertheless, as has already been shown, both the Legislature itself in the provisions of the statute and the police officers in enforcing it, recognized the discriminatory position which the unduly restrictive Pennsylvania weight law placed upon the bulk liquid motor carrier industry. In fact, for many years prior to the taxable year, the bulk liquid carrier vehicles were not stopped, weighed and fined, (129a) a recognition that the Pennsylvania law was antiquated in relation to the tremendous improvement both in the maneuverability of the larger trucks and in the highways themselves, and particularly in relation to the larger weight limits permitted in the surrounding states.

Hence, when enforcement was actively undertaken in the latter part of 1950 without any new legislation, the authorities themselves, as had the Legislature in the enactment of the law, indicated their content with the payment of the fine for the underlying purpose not to punish or deter, but to reimburse and compensate for alleged road damage. The fully loaded standard equipment was operating safely in the other states, and in the properly delegated opinion of the Pennsylvania enforcement authorities, could similarly continue to so operate in Pennsylvania without creating an obstacle to the free movement of traffic. Otherwise, the enforcement authorities would have required what they did not, namely the removal of the excess load.

forfeited, shall be paid to the department, and transmitted to the State Treasury, and credited to the "General Fund," except those collected for violations of the provisions of sections nine hundred and three (903), nine hundred and five (905), one thousand and two (1002), one thousand and eleven (1011), one thousand and fifteen (1015), one thousand and eighteen (1018), one thousand and twenty (1020), one thousand and twenty-six (1026), one thousand and twenty-eight (1028) of this act, committed within cities, boroughs, incorporated towns and townships, which fines and penalties and all bail forfeited shall be paid to the treasurer of the city, borough, incorporated town, or township wherein the violation occurred, to be used by such city, borough, incorporated town, or township, for the construction, repair, and maintenance of the highways thereof: Provided, That all fines and penalties collected and all bail forfeited for violations of the provisions of section one thousand and sixteen (1016), committed within cities, boroughs, incorporated towns, and townships, shall be paid to the treasury of the city, borough, incorporated town, or township wherein the violation occurred, to be used by such city, borough, incorporated town, or township, for the construction, repair and maintenance of the highways thereof: And provided further, That all fines and penalties collected and all bail forfeited for violations of the provisions of subsection (f) of section six hundred twenty (620), shall be paid to the treasury of the county wherein the violation occurred, to be used by such county for the payment of physicians' fees for the examination of persons accused of violating the provisions of the said section. Any balance remaining in the treasury of the county at the expiration of the calendar year, and not payable for physicians' services rendered, shall be used for county highway purposes.

* * *

Furthermore, just as the Court in *Bessman* found that a Congressional amendment to the Emergency Price Control Act subsequent to the taxable year revealed a legislative recognition that repayment for innocent violations did not frustrate any sharply defined policies of that Act in a year prior to the amendment, so also in the instant case, the Pennsylvania legislature in 1955 amended its weight laws to conform to the weights generally prevailing in the neighboring states, and to remove the discriminatory position which confronted the bulk liquid motor carrier industry in the taxable year (75 Pa. Purdon Stat. § 453 (pocket part)). This likewise shows the Pennsylvania legislature's recognition that the industry equipment which for many years prior to 1955 was bearing an approximate weight of 60,000 lbs. in the adjoining states without causing damage to the roads or an obstacle to traffic, could also operate under the same conditions in the state of Pennsylvania.

Hence, legislative removal of the earlier restrictive weight provision further indicates the place of the fine in the earlier scheme of enforcement—to allow continued operation of equipment which was really not harmful, upon payment of a fee in the form of a fine. In addition, the adoption of provisions in the new 1955 Pennsylvania legislation graduating the amount of the fine to the number of pounds overweight, and requiring mandatory and not discretionary removal of the excessive portion of the load by the enforcement authorities, indicates a new deterrent policy, absent from the earlier statute in force in 1951 (75 Pa. Purdon Stat. §§ 453, 454 (pocket part)).

Another factor which throws light upon the role of the fine in the scheme of enforcement of the weight limitation law, and whether its recognition as a legitimate deductible business expense would offend or frustrate Pennsylvania policies, is the manner in which the fine was treated by other state regulatory bodies. The Penn-

Act No. 70, Approved and Effective June 30, 1955, Amending the Vehicle Code of Pennsylvania.

903. *Weight of Vehicles and Loads* (75 Pa. Purdon Stat. § 453 (pocket part)

Whenever two vehicles are used or operated as a combination on any highway, the gross weight of the combination shall not exceed the sum of the maximum gross weights allowed for the respective vehicles and, in addition, the gross weight of the combination shall not exceed the gross weight specified as follows:

Combination.	Maximum Gross Weight in Pounds.
Truck tractor and single-axle semi-trailer	58000
Truck tractor and two-axle semi-trailer	60000
Commercial motor vehicle and trailer	62000

Penalty.—Any person operating any vehicle or combination of vehicles, upon any highway, with a gross weight or with weight on any axle or wheel exceeding by more than three (3) per centum the maximum weight allowed in that particular case, shall, upon summary conviction before a magistrate, be sentenced to pay the costs of prosecution and a fine for each and every pound of excess above the maximum weight allowed according to the following schedule:

If the excess is.	The fine shall be.
Not over 3000 pounds	$60.00
Over 3000 pounds, but not over 3500 pounds	120.00
Over 3500 pounds, but not over 4000 pounds	140.00
Over 4000 pounds, but not over 4500 pounds	240.00
Over 4500 pounds, but not over 5000 pounds	270.00
Over 5000 pounds, but not over 5500 pounds	400.00
Over 5500 pounds, but not over 6000 pounds	440.00
Over 6000 pounds, but not over 6500 pounds	600.00

sylvania Public Utility Commission, in regulating the activities of motor carriers subject to its jurisdiction, required that all accounting books, records and reports be prepared in accordance with Uniform System of Accounts, as interpreted by the Interstate Commerce Commission. Under this Uniform System, fines for operating overweight equipment in violation of state limitation laws were, in the taxable year and prior thereto, treated as an operating expense and recognized as a legitimate expense for rate making purposes (129a-130a).

Petitioner recognizes that accounting requirements of a regulatory agency are not controlling for tax purposes. Thus, in *Old Colony Railroad Co. v. Commissioner*, 284 U. S. 552, 562 (1932), this Court said that rules of accounting enforced upon a carrier by the ICC "are not binding upon the Commissioner, nor may he resort to the rules of that body, made for other purposes, for the determination of tax liability under the revenue acts".

However, it is equally true that although such rules of accounting are not binding, they may be considered as evidence of what is good, acceptable procedures resulting in the true reflection of income. In *Great Northern Ry. Co.*, 8 BTA 225 (1927), aff'd, 40 F. 2d 372 (CA 8, 1930) certiorari denied, 282 U. S. 855, the Board of Tax Appeals, in denying the fines paid by a railroad for violation of certain federal regulatory statutes in connection with the operation of the road were deductible as ordinary and necessary business expenses, noted at page 264 that the ICC did not classify such fines as operating expenses. Unlike the treatment accorded petitioner's overweight fines by the ICC, placing them in an operating expense account No. 4280 subtitled "Fines for traffic violations" (R. 129a-130a), the Great Northern Ry. Co. fines were required to be entered in a non-operating expense account not properly chargeable to income, covering fines for violations of the Act to regulate Commerce and other federal laws. The

For each additional 500 pounds, or part thereof, over 65000 pounds, $600.00 plus $50.00 for each additional 500 pounds, or part thereof: Provided That, in any case, in which there shall be concurrent violations of more than one of the clauses of this section prescribing maximum weights the penalty imposed shall be for violation of that clause which produces the greatest fine, but no penalty shall be imposed for violation of any other such clause.

* * *

In default of payment of any fine and costs of prosecution imposed, pursuant to the foregoing provisions of this penalty clause, the magistrate shall impound the vehicle, or combination of vehicles, and order the arresting officer, or other peace officer, to seize them. The magistrate shall, forthwith, notify the sheriff of the county wherein the violation occurred, who shall store the impounded vehicle, or combination of vehicles. The sheriff's costs, storage costs, and all other costs incident to impounding, shall be deemed additional costs of prosecution. The sheriff shall give immediate notice by telegram and registered mail, return receipt requested, of the impoundment and location of the vehicle, or combination of vehicles, to the owner of said vehicle, or combination of vehicles, and the owner of the load if said owners' names and addresses are known or can be ascertained by the sheriff.

The title to the load shall remain in the owner thereof and he shall be entitled to repossess it at any time upon presentation of proof of such ownership to the sheriff. If the load shall spoil during possession by the Commonwealth, the loss shall be upon the owner thereof, subject to any right of recovery of damages at common law that he may have against the owner of the vehicle or combination of vehicles and the cost of disposition thereof shall be deemed an additional cost of prosecution. In case any vehicle or combination of vehicles impounded or the load thereon as aforesaid, shall remain unredeemed, in the case of the vehicle or com-

Board of Tax Appeals, therefore, found this persuasive evidence that the fines paid by the railroad were not deductible as ordinary and necessary business expenses. Similarly, the fact that neither the Pennsylvania P. U. C. nor the I. C. C. for its own purposes, outlawed the overweight fines as a legitimate operating expense of motor carriers, indicates in no small part that the allowance of the payments for the fines as deductions for income tax purposes would not be offensive to the real policies and purposes of the Pennsylvania weight limitation law.

Furthermore, it is also highly significant that from 1942 to the latter part of 1950, respondent, by letter ruling, allowed the fines incurred for such overweight violations to be deducted as ordinary and necessary business expenses (App. 9a-12a). No sharply defined state policies were then thought to be frustrated. Petitioner was formed during this period. It acquired substantially all its equipment during this period. Nothing happened, at least in Pennsylvania, after respondent reconsidered his earlier ruling and disallowed the deduction for the period beginning December 1, 1950, to justify holding that for the future, a frustration of the Pennsylvania weight law would exist where previously it did not (App. 12a).

It should be noted that respondent first took the position that, although the payments for overweight violations were designated as fines in the respective state statutes, they more nearly resembled tolls, allowing the carriers the right to proceed upon the highways of the states without interference, than penalties imposed as punishment for violations of law. Respondent then also observed that the fines in the majority of cases were for revenue and no attempt was made by the states to have the excess load removed.

It is petitioner's contention that, insofar as Pennsylvania is concerned, respondent was correct in his earlier policy of allowing the payments of the fines as busi-

combination of vehicle and unclaimed, in the case of a load, for a period of sixty (60) days after notice of impoundment is given as aforesaid, the same shall be deemed to be abandoned and shall be disposed of by the sheriff upon order of the magistrate, in accordance with the procedures outlined in section four of the act, approved the third day of July, one thousand nine hundred forty-one (Pamphlet Laws 263), with the exception that the reference to a court therein contained for the purposes of this act, shall be construed to mean magistrate: And provided further, That the proceeds of such sale after the payment of encumbrances shall be applied to the payment of fine and costs and the balance thereof shall be remitted to the owner.

For the enforcement of this section all peace officers shall have the power to arrest on view for violation of any of the provisions of this section.

* * * *

§ 904. (75 Pa. Purdon Stat. § 454 (pocket part)) *Officers May Weigh Vehicles and Require Removal of Excess Load.*—Any peace officer who shall be in uniform, and shall exhibit his badge or other sign of authority, having reason to believe that the gross weight of a vehicle or combination of vehicles or the weight upon any axle or pair of axles thereof is unlawful, is authorized to weigh the same, either by means of portable or stationary scales, or may require that such vehicle or combination of vehicles be driven to the nearest stationary scales in the event such scales are within a distance of two (2) miles. If the gross weight or weight upon any axle shall exceed the maximum weight allowed therefor the peace officer may and if such excess is more than three (3) per centum of such maximum weight allowed he shall require the operator to reduce the load so as to bring the gross weight or weight upon an axle to not more than the maximum weight allowed except as herein provided for special permits.

Penalty.—Any operator who shall fail, neglect or refuse to comply with the requirements of a peace officer given pursuant to the provisions of this section, shall, upon summary conviction before a magistrate, be sentenced to pay a fine of one hundred ($100) dollars and costs of prosecution, and, in default of the payment thereof, shall undergo imprisonment for not more than thirty (30) days. In addition to the foregoing penalty the Secretary may suspend the operating privilege of the operator for a period of thirty (30) days.

Text of a Letter Dated September 10, 1942, and Signed by Guy T. Helvering, Commissioner (Symbols, IT:P:2—WTL):—(1950 CCH—Stand. Fed. Tax Rep. Vol. 5, ¶ 6134).

Reference is made to your letter of July 29, 1942, requesting advice with respect to the deductibility, for Federal income tax purposes, of "fines" incurred and paid to a State by motor carriers for violation of laws relating to maximum weights and lengths of trucks, consisting of a tractor and semi-trailer operating upon the highways of such State.

The pertinent facts are that the various States have their own laws as to maximum weights and lengths which vary considerably. Under the laws of the State of New York a tractor semi-trailer is allowed to carry 50,800 pounds while under the laws of the State of Tennessee the same equipment is allowed to carry only 39,000 pounds. The following example is set forth in your letter:

> Let us consider a hypothetical case where an operator has two units, each consisting of a tractor and semi-trailer; each unit having an unladen weight of 15,000 pounds. Should the carrier receive cargo weighing 60,000 pounds in State A where the weight limits allow 50,800 pounds; he could place on the one unit 35,800 pounds of cargo, which with the empty vehicle would

make a gross weight of 50,800. The other unit could be loaded with 24,200 pounds, which with the empty vehicle would make a gross weight of 39,200 pounds, and be under the weight limits for State A. Should this cargo have to travel through State B with a weight limitation of 45,000 pounds through State C, with a weight limitation of 40,000 pounds, to State D, with a weight limitation of 30,000 pounds, there would be two courses open to the carrier. One would be to secure permits for the particular unit which might be overweight in accordance with the State law, if such States issued permits. The other would be to load his cargo and take a chance on going through the States and paying a "fine" if caught, as the "fines" in most cases would be about the same as the cost for a permit. In our hypothetical case the heavier of the two units would be overweight in all States except the originating State and lighter of the two could pass through all States except E, the destination point.

You state that the matter of securing permits often forces the operator to take the chance on paying "fines", as it would probably require at least three or four days for a Maryland operator to secure permits in the States referred to above, and this delay might result in several contingencies, such as spoiling of perishable goods or loss of the cargo because of the urgency and need for speed. Should the operator decide on delaying the cargo and abide by all the laws, he could list the cost of permits as ordinary business expense and deduct it in his income tax return, but should he, as a matter of business, to prevent loss and satisfy the shipper and consignee, take his chances with "fines", he would not be permitted to deduct them in his income tax return. The "fines" in the majority of cases are for revenue and no attempt is made to have the excess load removed, which would place the "fines" in the same category as the amount paid for permits.

Amounts paid as penalties for violation of State statutes have been held to be non-deductible for federal income tax purposes either on the ground that such expenditures were avoidable and therefore are not a necessary incident to the operation of a business or because, on grounds of public policy they ought not to receive any sanction. (See *Burroughs Building Material Company v. Commissioner*, 18 B. T. A. 164, affirmed 47 Fed. (2d) 178, Ct. D. 297, C. B. XI, 307 (1931) and *Great Northern Railway Company v. Commissioner*, 40 Fed. (2d) 372; see also G. C. M. 11358, C. B. XII 1, 29 (1933) in which it is held that penalty payments in connection with income taxes, whether on account of negligence, delinquency, or fraud are not deductible from gross income.) However, as indicated in the *Burroughs Building Material Company* decision, *supra*, expenditures which are in themselves immoral, such as for bribery of public officials to secure protection of an unlawful business, would not have to be allowed in order consistently to justify a deduction of "fines" paid for violations of law involving no moral turpitude and practically inevitable. The court stated in that decision, in referring to the *Great Northern Railway Company* case, *supra*, that "fines" for violations of regulations which are inevitable in any large railroad system may, for that reason, reasonably be allowed as "ordinary and necessary" expenses of the business.

Although the amounts paid by the motor carriers are designated as "fines" in the statutes and regulations of the several States, they more nearly resemble a toll allowing the carriers the right to proceed upon the highways of such States without interference than as penalties imposed as a punishment for violations of law. The payment of such "fines" are shown by the facts to be a necessary incident to the operation of the business of such carriers.

It is the opinion of this office that the "fines" incurred and paid by the motor carriers under the circumstances stated above constitute "ordinary and necessary expenses

paid or incurred during the taxable year in carrying on any trade or business" within the meaning of section 23(a) of the Internal Revenue Code and are allowable business expense deductions."

Special Ruling Dated November 30, 1950 (1951-1 C. B. p. 15).

Reconsideration has been given to the conclusion heretofore reached by the Bureau that fines paid by truck operators for violations of State laws prescribing maximum weights, loads, and sizes of vehicles are deductible from gross income as ordinary and necessary business expenses under Section 23(a)(1)(A) of the Internal Revenue Code.

That conclusion was based upon the understanding that the fines in question were paid in lieu of fees which would have been payable for permits to operate overloaded or overlength vehicles, and that such permits were generally granted by the State highway authorities. The fines were, therefore, regarded as more in the nature of tolls than penalties.

Upon reconsideration of the question involved it appears that the premise on which the Bureau's conclusion was based was erroneous. It is therefore held that fines paid by truck operators for violations of State laws prescribing maximum weights, loads, and sizes of vehicles are penalties which are not deductible as ordinary and necessary business expenses under section 23(a)(1)(A) of the Internal Revenue Code. (See *Burroughs Building Material Co. v. Commissioner*, 47 Fed. (2d) 178, Ct. D. 297, C. B. X-1, 397 (1931), and G. C. M. 11358, C. B. XII-1, 29 (1933).)

Pursuant to authority contained in section 3791(b) of the Code, the instant ruling will not be applied to fines incurred or paid prior to December 1, 1950.